No.

In the Supreme Court of the United States

THE LOCAL CHURCH, ET AL.,

Petitioners,

v.

HARVEST HOUSE PUBLISHERS,
JOHN ANKERBERG, AND JOHN WELDON

Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The court below held that the Establishment Clause barred a church from maintaining a defamation suit when it was falsely labeled a "cult," even though the word "cult" carries a commonly understood defamatory meaning, and even though the publication specifically listed as among "the characteristics of cults" the engaging in such criminal behavior as prostitution, rape, beating, child molestation, drug smuggling, and murder.

The questions presented are:

1. Whether the First Amendment "ecclesiastical abstention" doctrine, which has only been applied by this Court in church property and church governance disputes, should be extended to impose heightened immunity from defamation liability arising in the context of religion.

2. Whether interpretations of the "ecclesiastical abstention" doctrine that impose heightened immunity from defamation liability arising in the context of religion violate the Free Exercise and Free Speech Clause of the First Amendment by denying to religious litigants access to redress for defamation that would otherwise exist under neutral principles of defamation law.

RULE 14.1(b) STATEMENT

The following entities, who were parties below, are also petitioners in this Court:

Living Stream Ministry

Assembly of the San Gabriellers

Church in Shreveport

The Church in Albuquerque

The Church in Anaheim

The Church in Arcadia

The Church in Atlanta, Inc.

The Church in Baton Rouge, Inc.

The Church in Beaumont

The Church in Bellevue

The Church in Bellingham

The Church in Berkeley

The Church in Birmingham

The Church in Boca Raton, Inc.

The Church in Boise

The Church in Cambridge, Inc.

The Church in Cary

The Church in Cerritos

The Church in Chula Vista

The Church in College Park

The Church in Corpus Christi

The Church in Cypress

The Church in Dallas, Inc.

The Church in Davis

The Church in Denton, Inc.

The Church in Diamond Bar

The Church in Dunn Loring

The Church in El Monte
The Church in Eugene
The Church in Fairborn
The Church in Fort Stockton
The Church in Fort Worth, Inc.
The Church in Fresno, Inc.
The Church in Fullerton Corporation
The Church in Houston
The Church in Huntington Beach
The Church in Huntsville, Inc.
The Church in Irvine, Inc.
The Church in Jackson
The Church in Jacksonville, Inc.
The Church in Kansas City, Inc.
The Church in Lafayette
The Church in Laredo
The Church in Little Rock
The Church in Long Beach
The Church in Los Angeles
The Church in Memphis
The Church in Miami, Inc.
The Church in Milwaukee
The Church in Mission Viejo, Inc.
The Church in Montebello
The Church in Monterey Park
The Church in Moreno Valley
The Church in Nashville
The Church in Newington, Inc.
The Church in North Providence
The Church in Nutley

The Church in Odessa
The Church in Oklahoma City, Inc.
The Church in Orlando
The Church in Palatine
The Church in Plano
The Church in Pleasant Hill
The Church in Portland
The Church in Pullman
The Church in Redding
The Church in Richardson
The Church in Riverside
The Church in Roseville
The Church in Sacramento
The Church in Salt Lake City
The Church in San Antonio, Inc.
The Church in San Diego
The Church in San Francisco, Inc.
The Church in San Jose
The Church in Santa Clara
The Church in Santa Clarita
The Church in Seattle
The Church in Spokane
The Church in Streamwood
The Church in Tacoma
The Church in Tampa, Inc.
The Church in Tempe, Inc.
The Church in Texarkana
The Church in Thousand Oaks
The Church in Torrance
The Church in Tucson, Inc.

The Church in Tulsa

The Church in Tyler

The Church in Victorville

The Church in Vista

The Church in Wichita, Inc.

The Church in Yorba Linda

The Church of God Which is in Philadelphia

The Local Church in El Paso

The Local Church in Raleigh

RULE 29.6 STATEMENT

No petitioner has a parent corporation, and no publicly held company owns 10% or more of any petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners "The Local Church," 95 plaintiff local churches, and Living Stream Ministry, petition this Court for a Writ of Certiorari to review the Judgment and Opinion of the Court of Appeals of Texas.

OPINIONS BELOW

The opinion of the Court of Appeals of Texas, App., *infra*, 1a-21a, is reported at 190 S.W.3d 204. That Court's order denying petitioners' timely petition for rehearing, App., *infra*, 26a, is unreported. The orders of the Supreme Court of Texas denying review, App., *infra*, 25a, and denying petitioner's timely petition for rehearing, App., *infra*, 27a, are unreported. The trial court's orders denying respondents' motions for summary judgment, App., *infra*, 22a-24a, are unreported.

JURISDICTION

The Court of Appeals of Texas rendered its judgment on January 5, 2006, and denied petitioners' timely petition for rehearing on May 18, 2006. The Texas Supreme Court denied petitioners' timely petition for review on December 1, 2006, and denied petitioners' timely petition for rehearing on February 16, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides: "Congress shall make no law respecting an Establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

STATEMENT

Petitioner The Local Church is a relatively small group of Christian churches. Petitioner Living Stream Ministry is a publisher established to serve those churches and the general Christian public. Respondent Harvest House is a publishing company that published a book written by respondents John

Ankerberg and John Weldon entitled *Encyclopedia of Cults and New Religions*.[1]

The introduction to the *Encyclopedia* states that "the groups contained herein deserve the title 'cult,'" and then attributes certain characteristics to cults, including the alleged practice of engaging in fraud, drug smuggling, prostitution, rape, physical beating, molestation of children, and murder. App., *infra*, 8a-9a. The Local Church is one of the so-called cults described in the *Encyclopedia*, on pages 211-12 of the book. *Id.* at 6a, 20a.

The gist of the defamation claim brought by The Local Church against Harvest House was that the inclusion of The Local Church among the "cults" listed in the *Encyclopedia* was an actionable false statement of fact, because the word "cult" as defined in the opening material of the *Encyclopedia* was not a mere theological pejorative, but rather a shorthand encapsulating the characteristics of groups that engaged in specifically articulated criminal behavior. App., *infra*, 9a, 20a. Harvest House moved for summary judgment three different times before two different judges, and in each instance summary judgment was denied by the trial court. The Texas Court of Appeals reversed, and the Supreme Court of Texas declined review.

Relying on this Court's opinion in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the Court of Appeals held that the word "cult" was not actionable, reasoning that "[u]nder the Establishment Clause of the

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[1] For brevity, the Petitioners are referred to collectively throughout this Petition as "The Local Church," Respondents collectively as "Harvest House," and the *Encyclopedia of Cults and New Religions* as the "*Encyclopedia*." Although the Petitioner churches regard themselves as "local churches," they and Living Stream Ministry do not refer to themselves collectively as the "The Local Church." The use of that collective term is adopted here as it is used in the *Encyclopedia* to refer to Petitioners.

First Amendment, civil courts are prohibited from deciding theological matters, or interpreting religious doctrine, or making matters of religious belief the subject of tort liability." App., *infra*, 10a. The court further held that the allegedly defamatory material in the *Encyclopedia* was not "of and concerning" The Local Church.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted To Resolve The Confusion In The Lower Courts Over The Extent To Which The Establishment Clause Bars The Imposition Of Tort Liability For False And Libelous Statements Of Fact Directed At Religious Groups.

A. The defamation claim of The Local Church and the holding below.

The Local Church was defamed by being labeled a "cult" as that term would have been understood by the ordinary reasonable reader, given the defining language supplied by Harvest House in its description of the "characteristics of cults."

The ruling below artificially dissected the claim of The Local Church in an analysis that arbitrarily segregated the word "cult" from the *Encyclopedia*'s list of specific criminal behaviors defining the characteristics of cults. The court below treated the word "cult" as an exclusively theological term, and as thus insulated from defamation claims by the doctrine of ecclesiastical abstention, and then treated the specific criminal behaviors listed in the *Encyclopedia* as not "of and concerning" The Local Church, and as thus beyond the ken of the defamation claim. App., *infra*, 10a-21a. This was constitutional error.

The word "cult" might be used in some contexts purely as a theological term, expressing opinions that cannot form the predicate for a defamation action. As many courts nationwide have recognized, however, the world "cult" also has a connotation in common language usage and in the public

mind associated with illicit and criminal behavior, such as brainwashing, abduction, physical assault, sexual abuse, suicide, and murder.[2] And the Local Church rested its defamation claim on the fact that this common understanding was reinforced by Harvest House's introductory material, which listed violent criminal behaviors purportedly describing the "characteristics of cults."

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[2] *See Kennedy v. Children's Serv. Soc'y of Wis.*, 17 F.3d 980, 984 (7th Cir. 1994) ("[I]t is clear that Gaunt's statements that the Kennedys were unsuitable parents because they belonged to a cult could give rise to a claim of defamation."); *New Testament Missionary Fellowship v. E.P. Dutton & Co.*, 491 N.Y.S.2d 626, 628 (N.Y. App. Div. 1985) (holding that book describing cults and oppressive practices of cults was actionable, noting that the publication operated to "tar all the groups covered by the book with the same brush, citing language that is libelous *per se*, for example: that they use mind control to ensnare young people 'who sign over their lives and property to con men they have been duped into believing are the Messiah'; 'parents are blackmailed into contributing large sums of money to the cult'" And holding that: "No innuendo is necessary to bring out the defamatory character of such words. It is for a jury to determine whether these words, directed generally to the 'cults' covered in the book, would lead the reasonable reader to believe, in the context of the whole book, that the plaintiffs had indulged in these practices."); *Landmark Educ. Corp. v. Conde Nast Publ'g Inc.*, 23 Media L. Rep. 1283 (N.Y. Sup. Ct. 1994) (holding actionable an article stating that plaintiff is among America's "most wanted cults"); *Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773 (Tex. App. 1995) (being labeled a "cultist" or "cult-like" held actionable). *But see Sands v. Living Word Fellowship*, 34 P.3d 955, 960 (Alaska 2001) (holding, in a case that did not involve the type of specific allegations of criminal misconduct at issue in *Harvest House*, that "[i]t is not factually verifiable whether a certain church is a 'cult' or whether church members are 'cult recruiters.' Instead, these are statements of religious belief and opinion.").

The Local Church thus did not argue below, and does not maintain here, that it was defamed *merely* by having been labeled a "cult" by Harvest House. Yet The Local Church has never acquiesced in the claim advanced by Harvest House, and accepted by the court below, that The Local Church's defamation claim rests *either* on the singular word "cult," considered in isolation, or on the explanatory material describing the "characteristics of cults" in terms that include specific criminal behavior, considered in isolation.

To the contrary, the defamation claim of The Local Church rests on the argument that the label "cult" and the specific criminal acts listed as among the characteristics of cults operate *in combination* to defame The Local Church. That combination simultaneously: (1) eliminated any cogent objection that Harvest House was immunized from this defamation claim by the "ecclesiastical abstention" line of Establishment Clause cases; (2) supplied the actionable defamatory content supporting the defamation claim, by basing the claim on objective facts capable of proof or disproof; and (3) rendered the defamatory content "of and concerning" The Local Church.

A chapter in the *Encyclopedia* was dedicated to The Local Church, and the *Encyclopedia* flatly stated that "the groups contained herein deserve the title [cult].'" App., *infra*, 8a. The accusation that The Local Church was a "cult" was thus manifestly "of and concerning" The Local Church. In reaching its judgment that under the Establishment Clause the term "cult" was not actionable, it simply *did not matter* to the court below that the word "cult" often carries a popular connotation associated with criminal activity, or that the introductory material in the *Encyclopedia* contained specific narrowing language that included a catalogue of specific criminal activity defining the characteristics of cults.[3]

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[3] Thus, the opening paragraph of the opinion below purported to encapsulate the ruling by stating: "*Because* we agree that the pas-

Harvest House argued below that the Introduction to the *Encyclopedia* included the caveat that not every cult listed in the volume possessed all the characteristics of cults identified in the Introduction. App., *infra*, 13a-14a. This is beside the point, either as a constitutional or a common-law matter.[4] *All*

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sages in the book *that refer to the church* are not, as a matter of law, *defamatory*, we reverse the judgment of the trial court and render judgment that the church take nothing from the publishers and authors." App., *infra*, 5a (emphasis added). Similarly, in the paragraph of the opinion below that frames the structure and logic of the issues as the court conceptualized them, the court stated:

> In their motion for summary judgment, the publisher and authors argue that the Introduction section of the book cannot be defamatory, as a matter of law, because (1) "the foundational context of the Encyclopedia centers on doctrinal and apologetic issues of theology," and (2) the introduction cannot be reasonably interpreted to defame every group in the book. To determine these issues, we consider first whether the label "cult" is actionable. Then, we turn to the issue of whether the negative attributes and practices attributable to "cults" are actionable.

App., *infra*, 10a. This passage clearly indicates that the court below understood the propriety of granting the motion for summary judgment as turning on the question of defamatory content, a question that was influenced both by whether the *Encyclopedia's* purported "foundational context" "centers on doctrinal and apologetic issues of theology" and by whether being labeled a "cult" and being tarred with the negative attributes and practices attributed to "cults" was actionable.

[4] The lower court's invocation of the so-called "group libel" doctrine, *see* App., *infra*, 14a-16a, 21a, is irrelevant to the constitutional review sought in this Court, and is a doctrinal red herring. At the threshold, this suit was never properly understood as a "group libel" case at all. In a true "group libel" case, a plaintiff who is *not* named in a communication asserts the right to sue for defamatory statements that target a collective group, positing that as a member of the group the plaintiff was individually defamed. See 1 Robert

the groups catalogued in the book must have been understood by the average reader as possessing at least *some* of the articulated "characteristics of cults," or they would not have been included in the book in the first place. Indeed, the reasonable reader would assume that all of the groups possessed such characteristics in sufficient measure to warrant inclusion.

In erroneously bifurcating the claim of The Local Church into two parts, and in erroneously invoking the ecclesiastical abstention line of precedent, the court below unconstitutionally preempted the opportunity of The Local Church to argue to a jury that in the context of the *Encyclopedia*, it was the *secular* meaning of the word "cult" as defined by Harvest House itself that would have been communicated to the average reader.

B. The holding below drew on this Court's "ecclesiastical abstention" cases, all of which have been limited to disputes over church property and church governance.

Relying on *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), one of the landmark cases in this Court's series of "ecclesiastical abstention" rulings, the court below reasoned that "[u]nder the Establishment Clause of the First Amendment, civil courts are prohibited from deciding theological matters, or interpreting religious doctrine, or

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D. Sack, SACK ON DEFAMATION § 2.9.1, at 2-133 (3d ed. 1999) ("The danger of permitting lawsuits where the plaintiff is *not* specifically identified is particularly acute in the circumstance of 'group libel.'") (emphasis added); *see also Eskew v. Plantation Foods, Inc.*, 905 S.W.2d 461, 462 (Tex. App. 1995). Here, in contrast, The Local Church *was* identified by name as a cult. If the world "cult" is actionable (with its meaning amplified by popular understanding and/or the context supplied by the Introduction to the *Encyclopedia*), then The Local Church is an appropriate plaintiff, and no discussion of "group libel" is required.

making matters of religious belief the subject of tort liability."[5] App., *infra*, 10a.

The ecclesiastical abstention doctrine invoked by the court below traces its beginnings to *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), which posed an oft-recurring question in church disputes: who owns the church after a schism in which the members of the church divide into two distinct bodies? When such a dispute arises, ecclesiastical tribunals will often be the first to rule on the question. In *Watson*, this Court held that "whenever the questions of discipline or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." 80 U.S. at 727. The principles announced in *Watson* presaged First Amendment developments, and have now been absorbed into constitutional law as orthodox Establishment Clause doctrine. As *Watson* elegantly explained, "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Id.* at 728.

It has long been clear, however, that the core principle articulated in *Watson* does not inexorably divest secular courts of the power to adjudicate disputes involving religious

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[5] In *Milivojevich*, the issue was whether a bishop had been properly removed as head of a diocese, an issue that would determine control of valuable church assets. The Court held that "where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them." *Milivojevich*, 426 U.S. at 709, *citing Maryland & Virginia Fellowship of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369 (1970).

parties in which a claimant seeks the enforcement of ordinary legal rights. In *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), for example, the dispute was over entitlement to certain income under a will that turned upon an ecclesiastical determination as to whether an individual would be appointed to a chaplaincy in the Roman Catholic Church. Justice Brandeis, writing for a unanimous Court, rejected the Archbishop's claim that secular courts lacked jurisdiction to adjudicate the issue because the claim implicated "spiritual property of a perpetual character subject to the jurisdiction of the ecclesiastical forum, and that thereby . . . was removed from the jurisdiction of secular courts." *Id.* at 15-16. In so doing, Justice Brandeis explained:

> The objection is not sound. The courts have jurisdiction of the parties. For the archbishop is a juristic person amenable to the Philippine courts for the enforcement of any legal right; and the petitioner asserts such a right. There is jurisdiction of the subject-matter; for the petitioner's claim is, in substance, that he is entitled to the relief sought as the beneficiary of a trust.

Id. at 16. In the subsequent line of decisions navigating between *Watson* and *Gonzales*, this Court has consistently held that the First Amendment *forbids* interpretation by secular courts of theological principles, or inquiries into the truth or falsity of religions claims, but *permits* application of neutral principles of law to adjudicate ordinary legal claims of religious parties. At the heart of this body of law there rests the fundamental principles that (1) secular courts in America may not determine the truth, falsity, or plausibility of a religious claim, but (2) religious institutions, no less than secular institutions, are entitled to enjoy the attention and protection of secular courts with respect to their secular claims.

C. This Court has never extended the ecclesiastical abstention doctrine to arenas outside the narrow domain of church property and governance disputes, much less to defamation law.

This Court has never extended the ecclesiastical abstention doctrine outside the narrow domain of disputes over church property and church governance. Nor should it.

All of the Court's cases applying this doctrine have involved disputes *among competing factions within religious organizations* over ownership of church property and assets, which followed disputes between those factions over who constituted the authentic leadership of the religious body claiming ownership. *See, e.g., Jones v. Wolf*, 443 U.S. 595 (1979); *Milivojevich*, 426 U.S. at 709; *Maryland & Virginia Fellowship of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970); *Presbyterian Church in the United States v. Mary Elizabeth Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). There is a kind of "spiritual federalism" at work in these ecclesiastical abstention cases, a deference to religious authorities to decide religious controversies.

Religious groups, however, are also part of civil society. Land is land, a trust is a trust, and a bank account is a bank account. Title and ownership must vest somewhere, and civil courts can and must at times adjudicate such property disputes even when the litigants are religious parties. To hold otherwise would deny to religious disputants the ordinary benefits of the rule of law.[6]

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[6] *See, e.g., Jones*, 443 U.S. at 602 ("The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively."), *citing Presbyterian Church*, 393 U.S. at 445.

What is true for the law of property is true for the law of torts. The ecclesiastical abstention doctrine should be kept in alignment with other First Amendment doctrines. In free speech cases, this Court has repeatedly held that journalists are not exempt from generally applicable neutral laws.[7] The same principle applies in the context of religion.[8] The ecclesiastical abstention doctrine should not impose any super-immunity from defamation over and above the neutral rules of civil liability that already apply as a matter of common-law and Free Speech Clause doctrine.

When a church is branded a "cult," and when that branding includes an imputation of purportedly defining characteristics encompassing criminal acts such as prostitution, rape, beating, child molestation, and murder, the ordinary common-law and constitutional law principles governing modern defamation actions provide ample space for a judge and jury to determine liability without encroaching on the spiritual sovereignty of ecclesiastical tribunals, venturing into the in-

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[7] In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), for example, the Court refused to engraft a First Amendment defense onto a promissory estoppel claim brought against a newspaper that violated a promise of confidentiality it had granted to a source. The Court stated that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669. *See also Citizen Publ'g Co. v. United States*, 394 U.S. 131, 138-40 (1969) (sustaining application of antitrust laws to the press); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-94 (1946) (sustaining application of the Fair Labor Standards Act to the press); *Associated Press v. United States*, 326 U.S. 1, 19-23 (1945) (sustaining application of antitrust laws to the press); *Associated Press v. NLRB*, 301 U.S. 103, 120-21 (1937) (sustaining application of the National Labor Relations Act to the press).

[8] *See Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 389-92 (1990) (sustaining generally applicable sales tax even as applied to religious books and merchandise).

terpretation of religious canon, or engaging in judgments of theology.

D. This Court has previously rejected broad First Amendment immunity from defamation claims.

In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court held that the Free Speech Clause does not impose an independent constitutional defense to defamation liability for any statement couched as an "opinion," over and above the core common-law and constitutional doctrines that already have built into them the elemental requirement that defamation liability be predicated on a false statement of fact. *Id.* at 19-20.

This Petition presents the Establishment Clause sequel to *Milkovich*. The Establishment Clause should not be impressed to perform the service that this Court in *Milkovich* held should not be performed by the Free Speech Clause, letting in through the back door a doctrine that this Court has already shut out through the front. The point of *Milkovich* was that the First Amendment does not insulate from defamation liability any statement simply because the statement is couched as "opinion," but rather permits the imposition of liability for statements that may have the trappings of opinion but actually communicate defamatory statements of fact.

No different rule should be imposed under the Establishment Clause. Statements with the trappings of "religious opinion" should not be protected when they are not true "opinions" at all, but rather statements that communicate defamatory statements of fact. To be sure, a defamation suit should not be used as a back-handed vehicle for collateral review of the judgment of a church tribunal on issues of faith and morals. But a defamation suit may be used to determine whether an author has libeled a church, so long as the ordinary rules of defamation law, rules that already require such fundamental elements as a "false statement of fact of and concerning the plaintiff," are satisfied. No theological expo-

sition is required to determine the truth or falsity of the accusation that a church is among a group of cults that engage in prostitution, rape, or murder.

Our system of justice should distinguish between defamation suits and heresy trials. Defamation actions should be governed by *Milkovich*, not *Milivojevich*. In *Milkovich*, this Court held that the Constitution did not require state courts to allow a defendant to escape scot-free from the liability that would attach to an otherwise actionable false statement of fact merely because that statement is embedded within a larger communication couched as "opinion" or "commentary." The Establishment Clause should likewise not be understood to create such a prophylactic zone of immunity for otherwise actionable statements embedded within a larger communication couched as "religious opinion" or "religious commentary."

As many courts nationwide have recognized, in the popular mind the word "cult" has acquired a distinctly negative meaning.[9] This meaning surely does *not* derive from any widespread public understanding regarding the common *theological* traits of cults. Theology and doctrine are not what give cults a bad name. Manifestly, the defamatory character of the word "cult" derives instead from the widespread association of "cults" in the popular mind with illicit and criminal behavior, a defamatory meaning that was specifically reinforced in this case through the *Encyclopedia*'s use of defining language.

The court below accepted and gave dispositive weight to Harvest House's self-serving characterization of its book as centered on religious doctrine and theology. The Local Church disputes the characterization of the *Encyclopedia* as a work of theology, and instead characterizes it as a guide to cults. But in the end, *even if* the *Encyclopedia* is treated as centered on theology, this in no way prevents it from also

[9] See the cases cited in n.2, *supra*.

containing false statements of facts that are actionable as defamation. No amount of inclusion of theological material mutes or masks the hard factual accusation that The Local Church is a "cult" within the meaning of that term as commonly understood by the average reader and as defined by the *Encyclopedia* itself. This label, as used by the *Encyclopedia*, was a defamatory communication carrying secular meaning about—*i.e.*, "of and concerning"—The Local Church.

E. There is a conflict among the lower courts.

Lower courts that have faced the issues raised by this Petition are divided, and lower court doctrine is in disarray. The Supreme Courts of Virginia, Montana, and Oklahoma, the United States Court of Appeals for the Sixth Circuit, and numerous lower state and federal courts, follow the approach of the court below, treating the Religion Clauses and the principle of ecclesiastical abstention as imposing heightened standards that prohibit or significantly frustrate efforts by plaintiffs to adjudicate defamation claims arising in religious contexts. In contrast, the highest courts of Iowa, Massachusetts, Pennsylvania, and the District of Columbia, along with numerous lower state and federal courts, follow the position advocated in this Petition.

In *Cha v. Korean Presbyterian Church of Washington*, 553 S.E.2d 511, 516 (Va. 2001), the Supreme Court of Virginia dealt with a defamation claim in which a church pastor was defamed by a church deacon's statement that the plaintiff "borrowed over $100,000 from believers and has not returned the money." *Id.* at 609. Notwithstanding that such a defamatory allegation of financial misconduct would normally be treated as "defamation per se" under Virginia law, the court held the action absolutely barred by ecclesiastical abstention principles, taking the extreme position that the Free Exercise Clause "divests a civil court of subject matter jurisdiction to consider a pastor's defamation claims against a church and its officials." *Id.* at 615. The Supreme Court of Montana in *Rasmussen v. Bennett*, 741 P.2d 755, 758-59

(Mont. 1987), held that it would violate the Free Exercise Clause to allow an action for libel or slander to proceed in a case involving accusations of adultery by a church member. In *Hadnot v. Shaw*, 826 P.2d 978 (Okla. 1992), the Supreme Court of Oklahoma rejected tort claims by terminated church members, including defamation claims arising from allegedly false charges of fornication allegedly published to persons outside the church, holding that "[w]ithin the context of ecclesiastical discipline, churches enjoy an absolute privilege from scrutiny by secular authority." *Id.* at 987.

In *Yaggie v. Indiana-Kentucky Synod, Evangelical Lutheran Church in America*, 64 F.3d 664 (Table), 1995 WL 499468 (6th Cir. Aug. 21, 1995), the Sixth Circuit held that the Religion Clauses erected a jurisdictional bar to adjudication of a defamation dispute arising in a religious context, even though the defamatory statements included statements that would clearly have been otherwise actionable, such as statements that the plaintiff should seek psychiatric treatment. The Sixth Circuit gleaned its absolutist position from this Court's holdings in cases such as *Milivojevich*, *Gonzalez*, and *Presbyterian Church*, treating those cases as divesting federal courts of the power to hear defamation claims arising from statements made in the context of religious disputes *even when* "'the alleged defamatory statements do not express any religious principles or beliefs.'" 1995 WL 499468, at *3, *quoting Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America*, 860 F. Supp. 1194, 1199 (W.D. Ky. 1994). Numerous lower courts similarly adopt the position that the Religion Clauses impose such sweeping immunity from defamation claims.[10]

[10] In *Higgins v. Maher*, 258 Cal. Rptr. 757 (Cal. App. 1989), the court held that a plaintiff priest had pleaded facts sufficient to support causes of action for defamation, invasion of privacy, and intentional infliction of emotional distress against a defendant bishop, arising from allegedly false accusations leveled against the priest by the bishop. The court held that the Religion Clauses

Standing in conflict with the rulings and rationales identified above, the Supreme Court of Iowa in *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404 (Iowa), *cert. denied*, 540 U.S. 977 (2003), dealt with a defamation action brought by member of a church against a

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would not bar the imposition of tort liability for tortious activity predicated on physical harm, such as battery or false imprisonment. *Id.* at 761. The court held, however, that causes of action such as defamation were barred by the Religion Clauses of the First Amendment, even though they would otherwise constitute actionable civil wrongs. *Id.* In *Schoenhals v. Mains*, 504 N.W.2d 233, 236 (Minn. Ct. App. 1993), the court invoked the doctrine of ecclesiastical abstention to bar a defamation claim that was based in part on the statement that the plaintiff had engaged in "[d]irect fabrication of lies with the intent to hurt the reputation and the establishment" of the Church, noting that while the statement was "unrelated to church doctrine on its face," the statement nevertheless related to the Church's reasons and motives for terminating the plaintiffs from the church, and was thus rendered not actionable under the Religion Clauses. In *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808 (Md. Ct. Spec. App. 1996), a Maryland Court noted the lack of guidance from this Court, observing that "[t]he Supreme Court cases have not, themselves, involved situations like that now before us—a suit for money damages based on a tort such as defamation—but rather have concerned, more directly, issues of church structure, governance, or property, including the selection of clergy." *Id.* at 811. The court dismissed a defamation claim arising from allegations of sexual misconduct by a priest, stating that "[n]onetheless, the withdrawal of ecclesiastical controversies from civil jurisdiction has been a broad one," citing with approval decisions following the absolutist approach, such as the decision of the Sixth Circuit in *Yaggie*. *Id. See also Klagsbrun v. Va'ad Harabonim of Greater Monsi*, 53 F. Supp. 2d 732, 741 (D.N.J. 1999); *Farley v. Wis. Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1290 (D. Minn. 1993); *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 714 N.E.2d 253 (Ind. Ct. App. 1999); *McManus v. Taylor*, 521 So. 2d 449, 451 (La. Ct. App. 1988).

church leader that arose from strife within the church. The church leader, a minister, had defamed the church member by referring to him as "the spirit of Satan" in a letter that was circulated outside the confines of the church to the general public within the local community. *Id.* at 405. The Iowa Supreme Court rejected the claim that the phrase "the spirit of Satan" was a "purely ecclesiastical term, deriving its meaning from religious dogma." *Id.* at 406.

The court noted that as a general rule secular courts have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies, including membership in a church organization, but they do have jurisdiction as to civil, contract, and property rights which are involved in or arise from a church controversy. Thus, Iowa's courts could not entertain a case that involved solely the discipline or excommunication of the church member. Nor, the court held, would the libel claim brought by the plaintiff have been viable had the matter been divulged solely to the members of the church itself. But the fact that the defamatory letter was published outside the congregation, the court reasoned, weakened this ecclesiastical shield. The Iowa Court held that the critical question was whether the phrase "spirit of Satan" could also have a secular meaning "that could be applied in a civil suit for defamation without treading on—or wading into—religious doctrine." *Id.* at 407-08. The court held that, while the term may have had religious roots, it also carries a common, and largely unflattering, secular meaning.[11] The court accordingly held that the case should proceed to a jury trial.

So too, in *Madsen v. Erwin*, 481 N.E.2d 1160 (Mass. 1985), the Supreme Judicial Court of Massachusetts held that "[u]nder the banner of the First Amendment provisions on religion, a clergyman may not with impunity defame a person,

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[11] *Id.* at 408, *citing Johnston v. Luebbers*, 288 F.3d 1048, 1061 (8th Cir. 2002); *Howard v. Covenant Apostolic Church, Inc.*, 705 N.E.2d 385, 388 (Ohio Ct. App. 1997).

intentionally inflict serious emotional harm on a parishioner, or commit other torts. The First Amendment religion provisions contain two concepts, 'freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.'" *Id.* at 726-27, *quoting Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).[12]

The decision below is similarly in conflict with the principles announced by the Supreme Court of Pennsylvania in *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Pa. 1975), in which the court held cognizable various tort claims arising from a religious shunning, holding that the "'shunning' practice of appellee church and the conduct of the individuals may be an excessive interference within areas of 'paramount state concern,' *i.e.*, the maintenance of marriage and family relationship, alienation of affection, and the tortious interference with a business relationship, which the courts of this Commonwealth May have authority to regulate, even in light of the 'Establishment' and 'Free Exercise' clauses of the First Amendment." *Id.* at 107.

Similarly, the District of Columbia Court of Appeals in *Lipscombe v. Crudup*, 888 A.2d 1171 (D.C. 2005), held that *Milivojevich* and related ecclesiastical abstention cases did not bar a defamation action arising from a church dispute, holding that the "otherwise religious relationship" of a pastor to a church member did not immunize the pastor from allegations of "'secular behavior' tortious in nature" (in that case,

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[12] *But see Hiles v. Episcopal Diocese of Mass.*, 773 N.E.2d 929, 936-38 (Mass. 2002) (in a defamation claim brought by an Episcopal priest arising from statements accusing him of adultery and sexual misconduct, the court held that if the defamatory statement arises in the direct context of internal disciplinary procedures implicating the church-minister relationship, an absolute bar to defamation claims exists.).

allegations that defendant had committed sexual harassment). *Id.* at 1174.

Numerous lower court decisions similarly support the position advanced by The Local Church in this Petition.[13] In

[13] The court in *House of God Which is the Church of the Living God, the Pillar and Ground of the Truth Without Controversy, Inc. v. White*, 792 So. 2d 491 (Fla. Dist. Ct. App. 2001), held that a defamation action against a pastor was not barred when the pastor accused a church member of being a "slut" in the presence of other clergypersons and parishioners while they stood at the church altar, noting that it was "well-settled that a court may hear an action if it will involve the consideration of neutral principles of law." *Id.* at 493. *See also Briggs & Stratton Corp. v. Nat'l Catholic Reporter Publ'g Co.*, 978 F. Supp. 1195, 1198 (E.D. Wis. 1997) ("After considering the defendants' arguments and authorities this court finds that it has subject matter jurisdiction over this lawsuit. Disposition of this suit will not inevitably involve analysis of church teachings and policies. Most of the statements at issue address the plaintiff's present and future business decisions, as well as the social and economic consequences of those actions. Analysis of these issues will involve the application of 'neutral principles of law,' and to that extent excessive government entanglement with religion need not result. . . . [T]o the extent that the articles can be construed as charging the plaintiffs with dishonorable or unethical conduct in their business operations, not related to religion per se, their claims will go forward."); *LeGrande v. Emmanuel*, 889 So. 2d 991, 994 (Fla. Dist. Ct. App. 2004) (reversing dismissal of defamation lawsuit that was based in part on defendants' assertion that the plaintiffs, a minister and his wife, had used money stolen from their church to buy a luxury automobile, because the "suit involve[d] a neutral principle of tort law that does not involve 'excessive' entanglement in internal church matters or in the interpretation of religious doctrine or ecclesiastical law"); *Callahan v. First Congregational Church Of Haverhill*, 808 N.E.2d 301, 313-14 (Mass. 2004) (differentiating between claims that were inextricably related to the Church disciplinary process, and thus outside the jurisdiction of a secular court, and allegations outside the church disciplinary process that could be actionable); *Holy Spirit*

at least one case rendered since *Harvest House*, a lower court has distinguished and refused to follow the decision below. In *Dr. R.C. Samanta Roy Inst. of Sci. & Tech., Inc. v. Lee Enters., Inc.*, 2006 WL 3692361 (E.D. Wis. 2006), the court characterized *Harvest House* as "holding that the act of labeling the church as a 'cult' in the book's introduction was not actionable as libel, because the truth or falsity of the statement depended upon one's religious beliefs, which was an ecclesiastical matter that could not be tried in a court of law," and refused to follow the decision, holding instead that in context before it the word "cult" could be actionable, and noting that "a decision of the Seventh Circuit, which is binding on this court, holds that stating that one belongs to a cult can give rise to a claim of defamation." *Id.* at *3, *4.

This Court's guidance is much-needed. The Court's intervention will serve the national interest in sound application of the First Amendment, and serve the interests of churches and religious organizations in the fair and even-handed application of defamation laws.

Ass'n for Unification of World Christianity v. Harper & Row, Publishers, Inc., 420 N.Y.S.2d 56, 60 (N.Y. Sup. Ct. 1979) ("The court agrees with plaintiffs that where the issue involves the validity of a religious denomination's beliefs, the First Amendment would bar such a claim, as it would embroil the state in an inquiry into the truth or falsity of beliefs or teachings; however, the alleged libelous statements involved in the case at bar do not involve the validity of beliefs and practices. The author is not concerned with whether the Reverend Sun Myung Moon is the true Messiah or whether the teachings of the Church are the word of God or the word of the Devil. The case is analogous to a situation where a given Church would be charged with taking its members money and lining the pockets of its clergy. It is a far cry from a situation where a state cannot refuse to license a motion picture on the ground that it is sacrilegious, to say that a religious institution is barred from bringing any claim for defamation.").

II. This Case Provides An Appropriate Vehicle For This Court To Resolve The Conflict Among The Lower Courts And To Repudiate Interpretations Of The Establishment Clause That Penalize Religious Plaintiffs And Place The Ecclesiastical Abstention Doctrine In Unnecessary Tension With The Free Exercise And Free Speech Clauses.

A. Sweeping Establishment Clause immunity may violate the Free Exercise and Free Speech Clauses.

In wrongly treating the Establishment Clause as imposing sweeping immunity from defamation rules that would otherwise apply, lower courts do more than simply extend the ecclesiastical abstention doctrine beyond its normal reach. To the extent that such decisions treat the religious subject matter of the dispute or the religious identity of the plaintiff as factors that influence the judgment about whether factual assertions are actionable, the decisions violate the nondiscrimination principles of the Free Exercise and Free Speech Clauses. And to the extent that the importation of the ecclesiastical abstention doctrine warps the application of defamation law principles that would otherwise apply, such decisions upset the carefully calibrated balance between the vindication of individual reputation and the preservation of robust public discourse that has evolved under the free speech principles emanating from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and it progeny.

Religious plaintiffs are as much entitled to the protections of the neutral principles of defamation law as nonreligious plaintiffs. *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947). This Court has on many occasions held that the Establishment Clause may not be invoked to justify discrimination against religious groups.[14] When

[14] *See, e.g., Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free School Dist.*,

courts treat as somehow "special" defamatory statements arising in the context of religion, the potential perils extend beyond mere Establishment Clause overkill. By treating the *religious content* of a defamation suit or the *religious identity* of a plaintiff as the triggers for super-insulating protection, courts violate the Free Exercise and Free Speech Clauses.[15]

In its modern defamation law decisions this Court has sought to strike the appropriate balance between our nation's robust commitment to freedom of speech and the vital interests served by defamation law, which this Court has described as reflecting "no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), *quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

Lower court decisions that penalize a defamation plaintiff because of plaintiff's religious identity or the general religious context in which the offending defamatory statements arose gratuitously inject an element of viewpoint discrimination into defamation law doctrine that violates well-established Free Speech Clause principles. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). Just as a dispropor-

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508 U.S. 384, 393-94 (1993); *Bd. of Educ. of Westside Cmty. Schools (Dist. 66) v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

[15] If, for example, the book here had been the "Encyclopedia of Violent Gangs," and its opening passages had characterized "violent gangs" as engaging in activity such as prostitution, rape, beating, child molestation, drug smuggling, or murder, standard common-law and constitutional doctrines would not have mandated dismissal. Similarly, if the book had been the "Encyclopedia of Terrorist Groups," and its opening passage had defined terrorist groups as engaging in a similar litany of criminal behaviors, standard doctrines would not have mandated dismissal. No different result should obtain when the book is an encyclopedia of cults.

tionate concern for the Establishment Clause could not justify denying to a student religious group its fair share of a state university's funding for student organizations and publications, a disproportionate concern for the Establishment Clause cannot justify denying to a defamation plaintiff its fair share of access to a state's civil justice system and the protection of its defamation laws. *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) ("There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.").

Sound common-law and constitutional law principles already adequately distinguish between, on the one hand, objectively provable or disprovable statements of fact, which are actionable as defamation, and, on the other hand, the figurative, hyperbolic, or subjective characterization that are not actionable. The cornerstone principle that secular courts may not adjudicate theology, interpret religious canon, or predicate legal liability on religious belief is not at all compromised by the sound application of ordinary neutral rules of defamation law.

There *may be* cases, of course, in which the naked claim that a religious group is a "cult" would require a court to venture into religious theology, doctrine, or belief.[16] But the set of such cases is exactly coterminous with the set of cases that the common law and the Free Speech Clause would already reject as not properly based on "false statements of fact." *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986); *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988).[17] The point here is that there will *also* be cases in

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[16] *See Jones v. Wolf*, 443 U.S. at 604 ("This is not to say that the application of the neutral-principles approach is wholly free of difficulty.").

[17] The ecclesiastical abstention doctrine ought not be extended to defamation cases at all. But if the doctrine is applied to defamation cases, then its application should be limited, at most, to defamation

which the accusation that a religious group is a "cult" (or some similar pejorative) does not, in context, implicate religious theology, doctrine, or belief *at all*, because in context the reasonable reader could and would conclude that the language used was selected to communicate factual attributes—such as engaging in specifically articulated criminal activity—that may be objectively proved or disproved as true or false. In such cases, the Establishment Clause does not require the construction of a super-barrier to liability, and the Free Exercise and Free Speech Clauses affirmatively forbid that construction.

B. This case is an appropriate vehicle for resolving the split among the lower courts and bringing much-needed clarity to First Amendment doctrine.

This case presents an appropriate vehicle for resolving the split among lower courts. The judgment below was an amalgam of Establishment Clause interpretation, applying the ecclesiastical abstention doctrine, and application of the "of and concerning" doctrine of defamation law, which in its modern form is itself a blend of common-law and Free Speech Clause doctrines. In artificially dividing the claim of The Local Church as it did, treating the word "cult" as severable from the "characteristics of cults," and in turn invoking the Establishment Clause to immunize Harvest House from liability for its use of the word "cult," the court below placed itself squarely within that group of lower courts that have

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actions that arise from statements made internally within a church tribunal or church governing process by the participants in that tribunal or process. When, as here, the defamatory statement arises entirely outside church tribunals and the processes of church governance, there is simply no cogent argument for invoking a doctrine designed to ensure that secular courts do not second-guess religious authorities on their "adjudication" of matters theological.

wrongly extended the concept of ecclesiastical immunity beyond its appropriate confines.

Cases that define the contours of the ecclesiastical abstention doctrine will always, by definition, present the intersection of constitutional law and non-constitutional law principles. That, indeed, is the basic focus of the doctrine—the determination of the extent to which secular courts can or cannot resolve a dispute through the application of neutral legal principles that will not ensnare them in review of ecclesiastical determinations.

When the ecclesiastical abstention doctrine is invoked in the context of modern defamation suits, the interplay of constitutional and non-constitutional doctrines is likely to be constantly present in yet a second sense, because modern defamation law has itself been heavily "constitutionalized." As defamation law has evolved in the wake of *New York Times Co. v. Sullivan*, many elements of the common-law cause of action for defamation are now an amalgam of common-law and constitutional law doctrine. Indeed, this is true of the very common-law doctrine that comprised part of the judgment below, the "of and concerning" requirement, which is now a doctrine of constitutional dimension.[18]

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[18] Since *New York Times Co. v. Sullivan*, a large part of modern defamation law has become an amalgam of constitutional law and common-law principles. In a wide variety of defamation-law contexts (as well as in the various privacy torts that are cousins to defamation), courts often treat common-law and constitutional-law doctrines as co-mingled, making adjustments to tradition common-law doctrines on the assumption that the gravitational pull of First Amendment requires them. Issues concerning "defamatory meaning" and the "of and concerning" doctrine partake of this intermingling. Thus, while the common law did not allow a defamation suit to be predicated on mere insult or hyperbole, this rule is now also understood as mandated by the First Amendment itself. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Greenbelt Coop. Publ'g Ass'n. v. Bresler*, 398 U.S. 6 (1970). The same forces are at

This Court can and should grant review of decisions at the intersection of federal constitutional law and state common-law doctrines to resolve lower court conflicts and repudiate errant constitutional interpretations that operate to frustrate or deny litigants the common-law protections that they would otherwise enjoy. This principle was applied most famously in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), in which the Court held:

> Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law.

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work with the "of and concerning" requirement. While historically this was a basic element of the common-law tort of defamation, it is now a doctrine of constitutional stature. *See, e.g., Rosenblatt*, 383 U.S. at 82; *Sullivan*, 376 U.S. at 292. Lower courts routinely treat the "of and concerning" doctrine as a constitutional requirement. *See, e.g., Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035, 1044-45 (C.D. Cal. 1998); *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 933, 937 (E.D. Wash. 1992); *Blatty v. New York Times Co.*, 728 P.2d 1177 (Cal. 1986). Normally, the constitutional elements of the doctrine operate as a First Amendment "floor," prohibiting the imposition of defamation liability as a matter of constitutional law when the defamatory material is not "of and concerning" the plaintiff. Yet as this Court made clear in *Milkovich*, this Court will also review defamation rulings that impose *more* First Amendment protection than is constitutionally required. *See Milkovich*, 497 U.S. at 19-20.

Id. at 568.

The rationale for granting review here is even stronger than in *Zacchini*. Here, the claim is not simply that lower courts are in conflict in their interpretation of the reach of the ecclesiastical abstention doctrine. Rather, the claim is that those lower courts on the side of this conflict that have indulged in an excessive interpretation of the ecclesiastical abstention doctrine are perniciously denying religious litigants the access to neutral principles of defamation law that they would otherwise enjoy, violating their rights under the Free Exercise and Free Speech Clauses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE
COURT OF APPEALS
FOR THE
FIRST DISTRICT OF TEXAS

NO. 01-04-00231-CV

HARVEST HOUSE PUBLISHERS, JOHN ANKERBERG, AND JOHN WELDON, APPELLANTS

V.

THE LOCAL CHURCH, AN UNINCORPORATED ASSOCIATION; LIVING STREAM MINISTRY, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN HOUSTON, A TEXAS NON-PROFIT CORPORATION, THE CHURCH IN ARLINGTON, A TEXAS NON-PROFIT CORPORATION; CHURCH IN BEAUMONT, A TEXAS NON-PROFIT CORPORATION; THE CHURCH IN CORPUS CHRISTI, A TEXAS NON-PROFIT CORPORATION; THE CHURCH IN DALLAS, INC., A TEXAS NON-PROFIT CORPORATION; CHURCH IN DENTON, INC., A TEXAS NON-PROFIT CORPORATION; THE LOCAL CHURCH IN EL PASO, A TEXAS NON-PROFIT CORPORATION; THE CHURCH IN FORT WORTH, INC., A TEXAS NON-PROFIT CORPORATION; THE CHURCH IN HUNTSVILLE, INC., A TEXAS NON-PROFIT CORPORATION; THE CHURCH IN PLANO, A TEXAS NON-PROFIT CORPORATION; CHURCH IN ODESSA A TEXAS NON-PROFIT CORPORATION; THE CHURCH IN RICHARDSON, A TEXAS NON-PROFIT CORPORATION ; THE CHURCH IN SAN ANTONIO, INC., A TEXAS NON-PROFIT CORPORATION; THE CHURCH IN TEXARKANA A TEXAS NON-PROFIT CORPORATION; THE CHURCH IN TYLER, A TEXAS NON-PROFIT CORPORATION; THE CHURCH IN FORT STOCKTON, A TEXAS NON-PROFIT CORPORATION;

CHURCH IN LAREDO, A TEXAS NON-PROFIT CORPORATION; CHURCH IN ALBUQUERQUE, A NEW MEXICO NON-PROFIT CORPORATION; THE CHURCH IN ANAHEIM, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN ARCADIA, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN CERRITOS, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN ATLANTA, INC., A GEORGIA NON-PROFIT CORPORATION; THE CHURCH IN BATON ROUGE, INC., A LOUISIANA NON-PROFIT CORPORATION; CHURCH IN BELLEVUE, A WASHINGTON NON-PROFIT CORPORATION; THE CHURCH IN BELLINGHAM, A WASHINGTON NON-PROFIT CORPORATION; THE CHURCH IN BERKELEY, THE CHURCH IN BIRMINGHAM, AN ALABAMA NON-PROFIT CORPORATION; CHURCH IN BOCA RATON, INC., A FLORIDA NON-PROFIT CORPORATION; THE CHURCH IN BOISE, AN IDAHO NON-PROFIT CORPORATION; THE CHURCH IN CAMBRIDGE, INC., A MASSACHUSETTS NON-PROFIT CORPORATION; THE CHURCH IN CARY, A NORTH CAROLINA NON-PROFIT CORPORATION; THE CHURCH IN CHULA VISTA, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN COLLEGE PARK, A MARYLAND NON-PROFIT CORPORATION; THE CHURCH IN CYUPRESS, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN DAVIS, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN DIAMOND BAR, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN DUNN LORING, A VIRGINIA NON-PROFIT CORPORATION; CHURCH IN EL MONTE, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN EUGENE, AN OREGON NON-PROFIT CORPORATION; THE CHURCH IN FAIRBORN, AN OHIO NON-PROFIT CORPORATION; THE CHURCH IN FRESNO, INC., A CALIFORNIA NON-PROFIT CORPO-

RATION; THE CHURCH IN FULLERTON CORPORATION, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN HUNTINGTON BEACH, A CALIFORNIA NON-PROFIT CORPORATION; CHURCH IN IRVINE, INC., A CALIFORNIA NON-PROFIT CORPORATION; CHURCH IN JACKSON, A MISSISSIPPI NON-PROFIT CORPORATION; THE CHURCH IN JACKSONVILLE, INC., A FLORIDA NON-PROFIT CORPORATION; THE CHURCH IN KANSAS CITY, INC., A MISSOURI NON-PROFIT CORPORATION; THE CHURCH IN LAFAYETTE, A LOUISIANA NON-PROFIT CORPORATION; THE CHURCH IN LITTLE ROCK, AN ARKANSAS NON-PROFIT CORPORATION; THE CHURCH IN LONG BEACH, A CALIFORNIA NON-PROFIT CORPORATION; CHURCH IN LOS ANGELES, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN MEMPHIS, A TENNESSEE NON-PROFIT CORPORATION; THE CHURCH IN MIAMI, INC., A FLORIDA NON-PROFIT CORPORATION; CHURCH IN MILWAUKEE, A WISCONSIN NON-PROFIT CORPORATION; THE CHURCH IN MISSION VIEJO, INC., A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN MONTEBELLO, A CALIFORNIA NON-PROFIT CORPORATION; CHURCH IN MONTEREY PARK, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN MORENO VALLEY, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN NASHVILLE, A TENNESSEE NON-PROFIT CORPORATION; THE CHURCH IN NEWINGTON, INC., A CONNECTICUT NON-PROFIT CORPORATION; THE CHURCH IN NORTH PROVIDENCE, A RHODE ISLAND NON-PROFIT CORPORATION; THE CHURCH IN NUTLEY, A NEW JERSEY CORPORATION; THE CHURCH IN OKLAHOMA CITY, INC., AN OKLAHOMA NON-PROFIT CORPORATION; THE CHURCH IN ORLANDO, A FLORIDA NON-PROFIT CORPORATION; THE

CHURCH IN PALATINE, AN ILLINOIS NON-PROFIT CORPORATION; CHURCH OF GOD WHISH IS AT PHILADELPHIA, A PENNSYLVANIA NON-PROFIT CORPORATION; THE CHURCH IN PLEASANT HILL, A CALIFORNIA NON-PROFIT CORPORATION; CHURCH IN PORTLAND, AN OREGON NON-PROFIT CORPORATION; THE CHURCH IN PULLMAN, A WASHINGTON NON-PROFIT CORPORATION; THE LOCAL CHURCH IN RALEIGH, A NORTH CAROLINA NON-PROFIT CORPORATION; THE CHURCH IN REDDING, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN RIVERSIDE, A CALIFORNIA NON-PROFIT CORPORATION; CHURCH IN ROSEVILLE, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN SACRAMENTO, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN SALT LAKE CITY, A UTAH NON-PROFIT CORPORATION; CHURCH IN SAN DIEGO, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN SAN FRANCISCO, INC., A CALIFORNIA NON-PROFIT CORPORATION; ASSEMBLY OF THE SAN GABRIELLERS, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN SAN JOSE, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN SANTA CLARA, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN SANTA CLARITA, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN SEATTLE, A WASHINGTON NON-PROFIT CORPORATION; CHURCH IN SHREVEPORT, A LOUISIANA NON-PROFIT CORPORATION; THE CHURCH IN SPOKANE, A WASHINGTON NON-PROFIT CORPORATION; THE CHURCH IN STREAMWOOD, AN ILLINOIS NON-PROFIT CORPORATION; THE CHURCH IN TACOMA, A WASHINGTON NON-PROFIT CORPORATION; THE CHURCH IN TAMPA, INC., A FLORIDA NON-PROFIT CORPORATION; CHURCH IN TEMPE, INC., AN ARIZONA NON-

PROFIT CORPORATION; THE CHURCH IN THOUSAND OAKS, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN TORRANCE, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN TUCSON, INC., AN ARIZONA NON-PROFIT CORPORATION; CHURCH IN TULSA, AN OKLAHOMA NON-PROFIT CORPORATION; THE CHURCH IN VICTORVILLE, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN VISTA, A CALIFORNIA NON-PROFIT CORPORATION; THE CHURCH IN WICHITA, INC., A KANSAS NON-PROFIT CORPORATION; CHURCH IN YORBA LINDA, A CALIFORNIA NON-PROFIT CORPORATION, APPELLEES

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2001-65993

OPINION

SHERRY RADACK, Chief Justice.

This is a libel suit brought by a church against a publisher and two authors after the church was included in a book about "religious cults," as that term is defined in the book. The publisher and authors moved for summary judgment, which the trial court denied. This interlocutory appeal followed. *See Tex. Civ. Prac. & Rem.Code Ann. § 51.014(b)* (Vernon Supp.2005). Because we agree that the passages in the book that refer to the church are not, as a matter of law, defamatory, we reverse the judgment of the trial court and render judgment that the church take nothing from the publisher and authors.

BACKGROUND

A. An Overview of the Encyclopedia of Cults and New Religions

John Weldon and John Ankerberg ["the authors"] wrote a book entitled *Encyclopedia of Cults and New Religions* ["the book"], which was published by Harvest House Publishers ["the publisher"]. The book is 700 pages long. It begins with a section entitled "How to Use this Book," which is followed by a 16-page Introduction, 57 separate chapters that describe various religious groups, including a chapter on appellees, The Local Churches and Living Stream Ministry [collectively, "the church"], and concludes with a 66-page section entitled, "Doctrinal Appendix."

The church is not named at all in the Introduction. The chapter on the church is 1 and 1/4 pages long. Living Stream Ministry, the publishing voice of the church, is mentioned once in the chapter.

The Doctrinal Appendix mentions the church twice and Living Stream Ministry once. The first mention of the church is in a chart with 15 other religious groups under the title "Different Concepts of God." The church is next mentioned in a list of 50 other religious groups under the subcategory "Religions, Cults, and the Deity of Christ." Living Stream Ministry is mentioned in a footnote, as the source of a quote from one of the church's founders.

PROPRIETY OF TRIAL COURT'S DENIAL OF SUMMARY JUDGMENT

The authors and publisher moved for a traditional summary judgment, contending that (1) the language of the book is not legally capable of any defamatory meaning, (2) the allegedly defamatory statements were not made with "actual malice," and (3) the statements were protected by the free

speech and press provisions of the United States and Texas Constitutions.[1]

A. Standard of Review

When reviewing the denial of summary judgment, we apply the same well-known standards applicable to the granting of summary judgment. *See Associated Press v. Cook*, 17 S.W.3d 447, 451 (Tex.App.-Houston [1st Dist.] 2000, no pet.). For their traditional summary judgment motion, the authors and publisher had the burden to show that no genuine issue of material fact existed and that they were entitled to judgment as a matter of law. *See* Tex.R. Civ. P. 166a(c); *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex.1972). A defendant who conclusively negates at least one of the essential elements of a cause of action is entitled to summary judgment on that cause of action. *Swilley*, 488 S.W.2d at 67. Likewise, a defendant who conclusively establishes each element of an affirmative defense is entitled to summary judgment. *Id.* Once the movant has established a right to a summary judgment, the burden shifts to the nonmovant. *Marchal v. Webb*, 859 S.W.2d 408, 412 (Tex.App.-Houston [1st Dist.] 1993, writ denied). The nonmovant must respond to the motion for summary judgment and present to the trial court any issues that would preclude summary judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979); *Marchal*, 859 S.W.2d at 412. The summary judgment should be granted if any of the theories advanced in the motion for summary judgment is meritorious. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex.1996).

B. Is the Language of the Book Defamatory as to the Church?

In their first issue on appeal, the publisher and authors contend that the language of the book cannot, as a matter of law, be defamatory. To maintain a cause of action for defa-

[1] *See* U.S. Const. amends. I, XIV; *Tex. Const. art. 1, § § 8, 29.*

mation, the plaintiff must prove that the defendant (1) published a statement (2) that was defamatory concerning the plaintiff (3) while acting with either actual malice, if the plaintiff was a public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998). Whether a publication is capable of being defamatory is initially a question of law to be determined by the court. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex.2000). To make this determination, the trial court should consider whether the words used are reasonably capable of defamatory meaning by considering the allegedly defamatory statement as a whole. *See Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 654-55 (Tex.1987). The determination is based on how a person of ordinary intelligence would perceive the entire statement. See also *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex.2002). This question is submitted to a jury only if the contested language is ambiguous or of doubtful import. *See Denton Pub. Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex.1970).

1. Is the Introduction Defamatory?

The church claims that it has been defamed by certain references made in the book's Introduction. Specifically, paragraphs 15-17 of the church's petition allege:

> 15. Within one year of the date of this Complaint, defendant published the *Encyclopedia*. The *Encyclopedia* consists primarily of descriptions of various religious organizations identified by the authors as cults. Preceding these descriptions is a lengthy, introductory section which informs the readers that, all of "the groups contained herein deserve the title" "cult." Under a subheading entitled "Characteristics of Cults," the introduction offers the reader a numbered list of negative attributes that the authors attribute to the "cults" described in the text. The introduction also includes many other statements at-

tributing misdeeds and other approbations to the groups listed in the *Encyclopedia*.

16. Among other things, the *Encyclopedia's* introduction specifically attributes to "cults" and therefore to Plaintiffs' the following:

A. Subjecting members to "physical harm" (Page XXIV).

B. "[F]raud or deception concerning" "fundraising" and "financial costs." (Page XXIV).

C. "[A]cceptance of shamanism." (Page XXIV).

D. "[E]ngaged in drug smuggling and other criminal activity, including murder." (Page XXV).

E. "[D]enied their followers *blood transfusions* and medical access." (Page XXV).

F. "[E]ncouraged prostitution." (Page XXV).

F. "[S]ometimes raped women." (Page XXV).

G. "[M]olested children." (Page XXV).

H. "[B]eaten their disciples." (Page XXV).

I. "[P]ractices black magic and witchcraft." (Page XXV).

17. The *Encyclopedia's* introduction expressly and implicitly imputes these "Characteristics of Cults" to the religious organizations described in the text. The language, layout, tone and tenor of the introduction is designed to, and does, cause a reasonable reader to conclude that the organizations described in the *Encyclopedia* were selected for inclusion therein precisely because they possess the "Characteristics of Cults" and commit the misdeeds listed. Furthermore, the authors expressly characterize their descriptions of Plaintiffs as factual: "Facts are facts." (Page XIX).

In their motion for summary judgment, the publisher and authors argue that the Introduction section of the book cannot be defamatory, as a matter of law, because (1) "the foundational context of the Encyclopedia centers on doctrinal and apologetic issues of theology," and (2) the introduction cannot be reasonably interpreted to defame every group in the book. To determine these issues, we consider first whether the label "cult" is actionable. Then, we turn to the issue of whether the negative attributes and practices attributable to "cults" are actionable.

a. *Is being labeled a "cult" actionable?*

The Introduction of the Encyclopedia defines a "cult" as "a separate religious group generally claiming compatibility with Christianity but whose doctrines contradict those of historic Christianity and whose practices and ethical standards violate those of biblical Christianity." In their motion, the publisher and authors claim that the Introduction "centers on doctrinal and apologetic issues." We agree. Under the Establishment Clause of the First Amendment, civil courts are prohibited from deciding theological matters, or interpreting religious doctrine, or making matters of religious belief the subject of tort liability. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 707, 96 S.Ct. 2372, 2379, 49 L.Ed.2d 151 (1976).

The issue of whether a group's doctrines are compatible with Christianity depends upon the religious convictions of the speaker. "Whether [a] statement of religious doctrine or belief is made honestly or in bad faith is of no moment, because falsity cannot be proved." *Tilton v. Marshall*, 925 S.W.2d 672, 679 (Tex.1996). "As such, no jury can be allowed to determine [the truth or falsity of one's religious beliefs] for '[w]hen triers of fact undertake that task, they enter a forbidden domain.'" *Id.* at 680 (quoting *United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944)).

In *Tran v. Fiorenza*, 934 S.W.2d 740, 742 (Tex.App.-Houston [1st Dist.] 1996, writ denied), the plaintiff, a Catholic priest, sued Bishop Fiorenza for defamation because the bishop wrote a letter in which he stated that the plaintiff had been excommunicated by the Catholic church. This Court held that it could not hear the plaintiff's defamation claim because, to decide whether a tort had, in fact, occurred, we would have to decide whether the plaintiff had been excommunicated, a matter of ecclesiastical concern. *Id.* at 744. The First and Fourteenth Amendments of the United States Constitution prohibit civil courts from deciding such ecclesiastical matters. *Id.* at 743.

Therefore, we conclude that being labeled a "cult" is not actionable because the truth or falsity of the statement depends upon one's religious beliefs, an ecclesiastical matter which cannot and should not be tried in a court of law. *See Sands v. Living Word Fellowship*, 34 P.3d 955, 960 (Alas.2001) (holding that reference to church as "cult" and church member as "cult recruiter" not actionable as defamation because statements convey religious belief and opinion and are not capable of being proven true or false).

b. *Is the description of the negative characteristics of a cult actionable?*

The Introduction of the book contains a list of 12 "characteristics of cults." The 12 characteristics of cults include the following.

> 1. Despite the claim to be a friend of Christianity, the new religious are rejecting or hostile to Christianity.
>
> 2. Despite the claim to allow for individual expression and to respect members as individuals, we discover a destructive authoritarianism and sanction-oriented mentality: members must obey explicitly or be punished or ex-communicated.

3. Despite a claim to interpret the Bible properly, the Bible is systematically misinterpreted, either through additional revelation that distorts proper biblical interpretation or through alien (mystical, symbolic, subjective) methods of interpretation.

4. Despite a claim to care for members, members are often subject to psychological, physical and spiritual harm through cult dynamics that reject biblical, ethical and pastoral standards.

5. Despite a claim to allow independent thinking, there is a restriction of independent thought, a rejection of reason and logic, and often unquestioning obedience to the leader or organization.

6. Despite public claim for openness and tolerance to other religions, exclusivism and intolerance are taught privately.

7. Despite the claim for independent verification and objective evidence in support of a group's beliefs and practices, the evidence is almost exclusively based in undocumented claim or the subjective realm-mystical experience or powerful occult experience.

8. Despite the claim to offer true spirituality and a genuine experience of God or ultimate reality, and despite the claim not to be occult, what is offered is often occult practices and beliefs.

9. Despite the claim for accurately representing one's history and to give a true portrait of a group's leader(s), there is a distortion-reinvention and cover-up-of a group's history and leader for purely advantageous interests.

10. Despite the claim to trust others, cults may be paranoid or persecution conscious, and they may be oppositional or alienated from the culture, having

> beliefs, values and practices opposed to those in the dominant culture.
>
> 11. Despite the claim for honesty there is use of intimidation or deception on both members and outsiders. There is often fraud or deception concerning a group's true teachings, the life of the founder, the group's history, fund-raising, front groups and financial cost.

The section of the book on the "characteristics of cults" concludes with the following paragraph, upon which most of the church's libel claims are based:

> When people are manipulated in different ways for ulterior motives, as cults are shown to do in this Encyclopedia, is not this to be condemned? Those cult leaders or gurus who have encouraged their followers to oppose moral convention, denied their followers *blood transfusions* and medical access, encouraged prostitution for making converts, sometimes raped women, beaten their disciples, molested children, practices black magic and witchcraft, engaged in drug smuggling and other criminal activity, including murder-do they not deserve the condemnation of us all? And such things have occasionally happened even in what many people regard as the "respectable" cults.

The church contends that some of the conduct mentioned in connection with the characteristics of cults-prostitution, rape, beating, molesting children, drug smuggling, and murder-are facts that can be proven false, and, therefore, are actionable under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S.Ct. 2695, 2706-07, 111 L.Ed.2d 1 (1990) (holding that statements of "opinion" may be actionable if containing facts provable as false).

The publisher and authors, however, argue that the characteristics of cults-including the criminal acts that the church

contends are provable as false under *Milkovich*- "cannot reasonably be interpreted to defame every group in the book." In other words, the publisher and authors argue that the second element of a defamation claim-that a defamatory statement was made *concerning the plaintiff*-cannot be met. We agree.

If a statement does not concern appellants, it cannot defame them, nor can it injure their reputations. *See Newspapers Inc. v. Matthews*, 161 Tex. 284, 339 S.W.2d 890, 893 (1960). For a plaintiff to recover for the publication of an allegedly libelous statement, the asserted libel must refer to some ascertained or ascertainable person and that person must be the plaintiff. *Id.* The publication need not make direct reference to the plaintiff individually; reference may be indirect, and it is not necessary that every listener understand it, so long as there are some who reasonably do so. *Davis v. Davis*, 734 S.W.2d 707, 711 (Tex. App.-Houston [1st Dist.] 1987, no writ).

Under the group libel doctrine, a plaintiff has no cause of action for a defamatory statement directed to some or less than all of the group when there is nothing to single out the plaintiff. *Eskew v. Plantation Foods, Inc.*, 905 S.W.2d 461, 462 (Tex.App.-Waco 1995, no writ); *Wright v. Rosenbaum*, 344 S.W.2d 228, 231-33 (Tex.Civ.App.-Houston 1961, no writ) (holding that statement that "one of the four ladies" stole dress, but not naming guilty person, was not slanderous of any particular person); *Bull v. Collins*, 54 S.W.2d 870, 871-72 (Tex.Civ.App.-Eastland 1932, no writ) (holding that statement that either A or B stole the money, without specifying guilty party, not slanderous); *Harris v. Santa Fe Townsite Co.*, 58 Tex.Civ.App. 506, 125 S.W. 77, 80 (1910, writ ref'd) (holding that statement that an unnamed "band of nine women" from South Silsbee cut a fence was not libelous because 15 women lived in South Silsbee).

In *Eskew*, the chief executive officer of the defendant company stated in the newspaper that "[I]rregularities in the

company's maintenance department prompted personnel changes.... Everyday we hire people, let people go and people quit.... I don't want to take the chance of coloring the innocent with any kind of accusation. I don't think everyone we let go had something to do with this. But some of those we let go, we think, were involved." 905 S.W.2d at 462. The plaintiff, one of the employees the defendant company had fired, sued for libel, contending that the chief executive officer's statement identified plaintiff as a wrongdoer even though he was not named in the story. *Id.* The court of appeals stated that "[the chief executive officer's] statement did not malign the entire group and is clearly referable only to an unidentified portion of a group." *Id.* at 463. As such, summary judgment was proper for the defendant company. *Id.* at 464.

Thus, in order for an alleged defamatory statement that is directed to an unidentified group of individuals to be actionable, it must create the inference that *all members* of the group have participated in the activity that forms the basis of the libel suit. If the statement refers to some, but not all members of the group, and does not identify to which members it refers, it is not a statement of and concerning the plaintiff.

The church argues that, under *Gibler v. Houston Post Co.*, 310 S.W.2d 377, 385 (Tex.App.-Houston [1st Dist.] 1958, writ ref'd n.r.e.), the statements regarding the alleged criminal acts are actionable, even if the church is not directly mentioned in connection with the criminal acts. Under *Gibler*, a libel plaintiff may maintain a cause of action, even if not named in the publication, if the language of the publication and the surrounding circumstances are such that friends and acquaintances of the plaintiff recognize that the publication is about the plaintiff. *Id.* In its petition, the church alleges that the book has defamed every group named therein. Specifically, the church alleges that the Introduction of the book "is designed to, and does, cause a reasonable

reader to conclude that the organizations described in the *Encyclopedia* were selected for inclusion therein precisely because they possess the 'Characteristics of Cults' and commit the misdeeds listed."

To the contrary, the Introduction of the book specifically states that "[t]he list [of the characteristics of a cult] is not exhaustive. Not all groups have all the characteristics and not all groups have every characteristic in equal measure...." The appropriate inquiry in determining what a reasonable reader would believe, for the purposes of libel, is objective, not subjective. *See New Times v. Isaacks*, 146 S.W.3d 144, 162 (Tex.2004). The question is not whether some actual readers were misled by the publication, as they inevitably will be, but whether the hypothetical reasonable reader could be. *Id.* Moreover, the prefatory language "[t]hose cult leaders or gurus" is restrictive-focused only upon those leaders who commit such acts, not on all leaders or gurus. In sum, considering the Introduction as a whole, we cannot conclude that a reasonable reader could believe that all groups named in the book participate in the criminal activities that plaintiffs claim as the basis of their libel action. No reasonable reader could conclude that the book accuses the church, and, in fact, every other church named in the book, of rape, murder, child molestation, drug smuggling, etc. As such, the allegedly libelous statements in the Introduction are not "of and concerning the church" and are not actionable.

2. Is the Doctrinal Appendix Defamatory?

The church also contends in its petition that it has been defamed by certain portions of language in the Doctrinal Appendix. Specifically, paragraph 18 of the petition alleges the following:

> 18. The Encyclopedia also includes a section entitled "Doctrinal Appendix." This Section attacks the groups included in the Encyclopedia, in-

cluding Plaintiffs with further defamatory statements including the following:

A. The groups included in the book "accept occult powers." (Page 708);

B. The groups included in the book are "associated with idolatry" and "universally promote idolatry" with its inevitable outcome "human sacrifice." (Pages 710, 721);

C. The groups included in the book engage in "murder," "child sacrifice," "prostitution," and "snake worship" (Pages 714, 722).

In their motion for summary judgment, the publisher and authors argue that the Doctrinal Appendix section of the book cannot be defamatory, as a matter of law, for the same reasons that the Introduction is not defamatory, i.e., because (1) "the foundational context of the Encyclopedia centers on doctrinal and apologetic issues of theology" and (2) the Doctrinal Appendix cannot be reasonably interpreted to defame every group in the book. To determine these issues, we consider first whether being accused of "accepting occult powers" and "promoting idolotry" is actionable. Then, we turn to the issue of whether the negative attributes and practices attributable to "cults" are actionable.

a. *Is being accused of "accepting occult powers" and "promoting idolatry" actionable?*

The Doctrinal Appendix defines "idolatry" as the "worship of false gods and spirits" and occult [demonic] powers and practices are associated, in the text, with idolatry. The section of the Doctrinal Appendix on the occult and idolatry is entitled "The Occult: The Modern Spiritual Counterfeit."

As with the definition of the term "cult," which we discussed earlier, whether someone worships a false god or accepts occult powers and practices depends upon the speaker's religious beliefs. "To avoid conducting 'heresy trials,' courts may not adjudicate the truth or falsity of religious doctrines

or beliefs." *Tilton*, 925 S.W.2d at 678-79. "Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." *Unites States v. Ballard*, 322 U.S. 78, 86-87, 64 S.Ct. 882, 886-87, 88 L.Ed. 1148 (1944).

Because the statement concerns the speaker's religious beliefs, which cannot be proved true or false, an allegation that one is an idolator and accepts occult powers is not actionable.

b. *Are the statements regarding human sacrifice, murder, child sacrifice, prostitution, and snake worship actionable?*

The publisher and authors argue that the occult practices that are mentioned in the Doctrinal Appendix, "cannot reasonably be interpreted to defame every group in the book." In other words, the publisher and authors argue again that the second element of a defamation claim-that a defamatory statement was made *concerning the plaintiff*-cannot be met. Again, we agree.

None of the passages alleged to be defamatory in the Doctrinal Appendix mention the church at all. The occult practice of human sacrifice, which gives rise to one of the church's libel allegations, is mentioned in the following passage:

> As [the Bible verses referenced earlier] suggest, in ancient Israel occult practices were associated with idolatry (worship of false god and spirits) and inevitably led to human sacrifice, as is increasingly occurring in the Western world today.

This passage does not accuse the church, or indeed any of the organizations named in the book, of human sacrifice. Instead, it points out that, *in ancient Israel*, idolatry led to human sacrifice, in the authors' opinion. As such, the statement regarding human sacrifice is not of and concerning the church.

The occult practices of child sacrifice and murder, which give rise to another of the church's libel allegations, are mentioned in a section of the Doctrinal Appendix that lists what the authors refer to as "the capacities or methods of fallen angels [demons]." Again, the passage does not refer to the church at all, or any other organization in the book. There is nothing in this list of "demonic powers" to lead a reasonable reader to conclude that the church possesses or uses these powers to commit child sacrifice or murder. As such, the passage in the Doctrinal Appendix that refers to child sacrifice and murder is not of and concerning the church.

The occult practices of child sacrifice, prostitution, and snake worship are mentioned in the following passage from the Doctrinal Appendix.

> Idolatry (Gr.eidololatria). Idolatry in ancient times included two forms of departure from the true religion: the worship of false gods (whether by means of images or otherwise); and the worship of the Lord by means of images. All the nations surrounding ancient Israel were idolatrous.... The gods had no moral character whatsoever, and worship of them carried with it demoralizing practices, including child sacrifice, prostitution and snake worship....

Again, this clearly does not refer to the church or any of the organizations named in the book. It is a historical reference to ancient Israel and what the authors perceive as the result of idolatry in that day and age. As such, it is not a statement of and concerning the church and is not actionable.

In sum, considering the Doctrinal Appendix as a whole, we cannot conclude that a reasonable reader would believe that all groups named in the book participate in the "occult practices" that plaintiffs claim as the basis of their libel action. Because the allegedly libelous statements in the Doctrinal Appendix are not of and concerning the church, they are not actionable.

3. Is the Chapter regarding "The Local Church" Defamatory?

The church does not allege that the chapter on it contains defamatory language. Instead, it argues that the fact that there is a chapter on it would lead a reasonable person to conclude that it "routinely engage[d] in the activities set forth in paragraph 16 and 18 above." Specifically, the petition alleges the following:

> 19. The *Encyclopedia* contains a section entitled "The Local Church." This section also expressly identifies Living Stream Ministry. When read in conjunction with the *Encyclopedia's* introduction and appendix, this section conveys false and defamatory message [sic] that the Local Church, the Churches, and Living Stream Ministry routinely engage in the activities set forth in paragraph 16 & 18 above. The section of the *Encyclopedia* entitled "The Local Church" is reasonably read in conjunction with and in the context of the *Encyclopedia's* introduction and appendix, including the "Characteristics of Cults" subsection. The contents of these sections, including the defamatory statements described herein, were understood by readers to refer to and concern the Plaintiffs herein.
>
> 20. The above-described statements are defamatory per se in that they falsely impute immoral, illegal and despicable actions to Plaintiffs. In truth and in fact no Plaintiff has ever engaged in such actions. The false and defamatory statements set forth herein expose Plaintiffs to hatred, contempt, ridicule, and financial injury.

The gist of the church's complaint is that, by calling it a "cult" and including a chapter on it in the book, the publisher and authors have accused it of every "immoral, illegal and despicable action" mentioned in the book. However, as we

stated earlier, under the group libel doctrine, a plaintiff has no cause of action for a defamatory statement directed to some or less than all of the group when there is nothing to single out the plaintiff. *Eskew*, 905 S.W.2d at 462. We have already held that nothing in the book singles out the church as having committed the "immoral, illegal, and despicable" actions alleged in its petition. Simply being included in a group with others who may have committed such "immoral, illegal, and despicable" actions does not give rise to a libel claim.

CONCLUSION

Because the allegedly libel statements are not defamatory, as a matter of law, we sustain the publisher and authors' first issue on appeal. Accordingly, we need not address the remaining issues and decline to do so.

We reverse the judgment of the trial court and render judgment that the church take nothing from the publisher and authors.

No. 2001-65993

THE LOCAL CHURCH An unincorporated association, et al.	§	IN THE DISTRICT COURT OF
Plaintiffs	§	
VS.	§	
HARVEST HOUSE PUBLISHERS, an Entity incorporated in Oregon and California	§	HARRIS COUNTY, TEXAS
JOHN ANKERBERG, an individual; and JOHN WELDON, an individual,	§	80TH JUDICIAL DISTRICT
Defendants	§	

ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants' Motion for Partial Summary Judgment is DENIED.

Done at Houston, Texas, August 12, 2002, 2002.

/s/
SCOTT LINK, PRESIDING JUDGE
80TH DISTRICT COURT

No. 2001-65993

THE LOCAL CHURCH An unincorporated association, et al.	§	IN THE DISTRICT COURT OF
Plaintiffs	§	
VS.	§	HARRIS COUNTY,
HARVEST HOUSE PUBLISHERS, an Entity incorporated in Oregon and California	§	TEXAS
JOHN ANKERBERG, an individual; and JOHN WELDON, an individual,	§	80TH JUDICIAL DISTRICT
Defendants	§	

ORDER DENYING DEFENDANTS' MOTION SUMMARY JUDGMENT

Defendants' Motion for Summary Judgment is DENIED. Further, the discovery stay is lifted, and discovery may proceed.

Done at Houston, Texas June 13, 2003.

/s/ (illegible) 6/13/03
JUDGE PRESIDING

Cause No. 2001-65993

THE LOCAL CHURCH an unincorporated association, et al.	§	In The District Court Of
Plaintiffs	§	
vs.	§	Harris County, TEXAS
HARVEST HOUSE PUBLISHERS, an Entity incorporated in Oregon and California JOHN ANKERBERG, an individual; and JOHN WELDON, an individual	§	80th Judicial District

ORDER

The Court has considered Defendants' second motion for summary judgment. After review of the motion, the response, and hearing argument of counsel, the Court has determined that it should be denied. It is, therefore,

ORDERED that Defendants' summary judgment is denied.

Signed this 9th day of March, 2004.

/s/

Kent C. Sullivan
District Judge

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS

Post Office Box 12248

Austin, Texas 78711-2248

RE: Case No. 06-0527 DATE: 12/1/2006

COA #: 01-04-00231-CV TC# 2001-65993

STYLE: THE LOCAL CHURCH, LIVING STREAM MINISTRY, ET AL.
v.
HARVEST HOUSE PUBLISHERS, JOHN ANKERBERG, AND JOHN WELDON

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON

MEMORANDUM ORDER ON MOTION FOR REHEARING

Cause number: 01-04-00231-CV

Style: Harvest House v. Local Church

Date motion filed: February 16, 2006

Party filing motion: Appellee

It is **ordered** that the motion for rehearing is **denied**.

Justice's signature: /s/ Chief Justice Sherry Radack
Acting for the Court

Panel Consists Of: Chief Justice Radack, Justices Alcala, Bland

Date: May 18, 2006

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS

Post Office Box 12248

Austin, Texas 78711-2248

RE: Case No. 06-0527 DATE: 12/1/2007

COA #: 01-04-00231-CV TC# 2001-65993

STYLE: THE LOCAL CHURCH, LIVING STREAM MINISTRY, ET AL.
v.
HARVEST HOUSE PUBLISHERS, JOHN ANKERBERG, AND JOHN WELDON

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. The Motion to Defer Ruling on Motion for Rehearing is dismissed as moot.

(2)

No. 06-1520

IN THE

Supreme Court of the United States

THE LOCAL CHURCH, LIVING STREAM MINISTRY, *ET AL.*,

Petitioners,

v.

HARVEST HOUSE PUBLISHERS,
JOHN ANKERBERG, AND JOHN WELDON

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the First District of Texas

BRIEF OF CHRISTIAN RESEARCH INSTITUTE, ANSWERS IN ACTION, NEIGHBORING FAITHS PROJECT, HANK HANEGRAAFF, GRETCHEN PASSANTINO, JOHN MOREHEAD AND RUTH A. TUCKER *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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II. This Court should clarify the law at the intersection of the Establishment Clause and the law of defamation—falsely labeling a group a "cult" in the *theological* sense should not be actionable, but falsely labeling a group a "cult" in a *secular* sense should be. 6

III. The Establishment Clause is not implicated in this case because those labeled "cults" in the ECNR were so labeled not merely in the *theological* sense but also in the *secular* sense, and the Local Church's claims are based on the latter not the former. 7

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U.S. Const. amend. 1 ..... passim.

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Christianity in Crisis, Hank Hanegraaff, pp. 42-43 ..... 4, 5
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INTERESTS OF THE *AMICI CURIAE*[1]

Amicus curiae **Christian Research Institute** (CRI) is an organization that provides carefully researched information regarding cults and is the largest apologetics ministry in the world. *Amicus curiae* **Answers in Action,** with co-founder Gretchen Passantino, is a non-profit organization based in Costa Mesa, California, that produces articles and newsletters and sponsors classes and seminars in apologetics, evangelism, philosophy, and theology. *Amicus curiae* **Neighboring Faiths Project** with its founder, John Morehead, is an evangelical apologetics organization that provides research and writing in the area of new religious movements. *Amicus curiae* Dr. Ruth A. Tucker, is an evangelical author and former Professor of Missions at Calvin Theological Seminary.

These amici understand from their many years of experiences studying and writing about cults that there is no label more damning and destructive that can be attached to a religious group. Amici agree that the Establishment Clause protects from defamation liability describing a group as a "cult" in a *theological* sense (*i.e.* that the group is "heretical" or departs from historical Christianity). However, this case is about labeling a group a "cult" in a *secular* sense, and attributing abhorrent—even criminal—conduct to the group, including such things as child molestation, rape, and murder. Amici are concerned that if religious publishers and broadcasters are granted immunity to freely, and falsely, tar reli-

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office. Outside counsel for *amici*, Douglas W. Alexander, served as lead counsel for petitioner in this case in the petition for review proceeding before the Supreme Court of Texas. Mr. Alexander has since ceased to represent Petitioner in this matter.

gious groups in such a manner, the result will be to silence such groups merely because they are not "mainstream."

None of the amici is a party to this proceeding. Amici urge this Court to grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Alaska Supreme Court has recognized, the Establishment Clause protects from defamation liability describing a religious group as a "cult" in a *theological* sense. However, as the Seventh Circuit has recognized, falsely using the label "cult" in the *secular* sense is subject to defamation liability. The court below held otherwise, concluding that, because "cult" is a religious term per se, its use is never actionable in defamation.

This case lies at the intersection between the Establishment Clause and the law of defamation. Where, as here, a publication falsely labels a religious group a "cult" in the *secular* sense, and attributes to such group abhorrent, and even criminal, conduct, the Establishment Clause should not protect such speech. Yet the court below held that such speech is protected. This Court should grant certiorari to clear up the confusion that lies at the heart of First Amendment jurisprudence.

ARGUMENT

I. The court of appeals' sweeping holding that the term "cult" is not capable of defamatory meaning—even when criminal and abhorrent conduct is ascribed to those labeled with that term—raises significant concerns in the religious community because it allows religion to be used as a cloak for intentional, and potentially destructive, defamation of religious groups.

The court of appeals holds in sweeping fashion that the term "cult" is not capable of defamatory meaning because it is per se an "ecclesiastical" term:

> [W]e conclude that being labeled a "cult" is not actionable because the truth or falsity of the statement depends on one's religious beliefs, an ecclesiastical matter which cannot and should not be tried in a court of law.

Harvest House Publishers v. Local Church, 190 S.W.3d 204, 211 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). The fundamental problem with this statement, from the perspective of those in the religious community, is that the term "cult" is *not* merely an *ecclesiastical* or *theological* term. To the contrary, the term "cult" in general social discourse is most often used in a *sociological* or *secular* context, referring to a group whose practices are fraudulent, deceptive, authoritarian, manipulative, morally reprehensible, and criminal. Such use does not necessarily include a theological framework (*i.e.*, referring to a group whose behavior is "cultic" and whose beliefs diverge from "accepted" doctrines of historic Christianity[2]).

The court of appeals' decision confuses this distinction and, in so doing, establishes dangerous precedent. In CRI's 40 years of professional experience, the term "cult" and its behavioral connotation has frequently been utilized as a code

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[2] *Christianity in Crisis*, Hank Hanegraaff, pp. 42-43. The authors of ECNR also acknowledge this issue on pp. XXI-XXII of ECNR.

word to impute crimes and immorality to groups labeled as cults. This use of the term has been a matter of concern for Christian apologists and secular religious scholars who write about other religions.

As far back as the 1970s, authors have acknowledged the use of the term "cult" by "secular anti-cultists" to refer to groups that are purportedly "sociologically destructive.[3]" *Christianity Today* recently discussed the problematic use of the term "cult" in society:

> Still, the word cult is a problem. For better or worse, it has shifted in meaning and has become associated with bizarre groups like the People's Temple and Heaven's Gate. To write about cults and include groups like the Local Church is to plant an unfortunate association in people's minds—no matter how many qualifications are made. We would all be wise to drop the word, except for the most extreme instances.[4]

By broadly holding that under no circumstance is the term "cult" actionable—based on a failure to distinguish between the *theological* and *secular* uses of the term—amici are concerned about the precedent established by the Texas court of appeals' decision. That decision, under the rubric of "cult as a religious term," essentially allows religious publishers and broadcasters to freely tar those religious groups with whom they disagree. Not only may publishers freely label such groups "cults," but they can also ascribe to such groups, under the "cult" label, secular wrongdoings—including criminal conduct—that in any other nonreligious context would be actionably defamatory. This threatens to upset the balance between an entity's right to free speech versus the protection of the reputations and religious liberties of small religious groups. In other words, the Texas court's

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[3] *Christianity in Crisis* at 43.

[4] *Christianity Today*, March 2006 issue.

decision essentially allows religion to be a cloak for intentional defamation, under circumstances where no such cloak should exist.

II. This Court should clarify the law at the intersection of the Establishment Clause and the law of defamation—falsely labeling a group a "cult" in the *theological* sense should not be actionable, but falsely labeling a group a "cult" in a *secular* sense should be.

Amici agree that describing a religious group as a "cult" in a *theological* sense, even if false, should be protected from being actionably defamatory by the Establishment Clause. This was essentially the holding of the Alaska Supreme Court in *Sands v. Living Word Fellowship*, 34 P.3d 955, 960 (Alaska 2001) (describing a religious group as a "cult" was protected by the First Amendment where it constituted nothing more that a "pronouncements of religious belief and opinion.").

On the other hand, falsely labeling a group a "cult" in a *secular* sense should be actionable, given the opprobrium attached to that term in modern society.[5] The Seventh Circuit recognized this point in *Kennedy v. Children's Service Society of Wisconsin*, 17 F. 3d 980, 984 (1994) (holding that "statements that the Kennedys were unsuitable parents because they belonged to a cult could give rise to a claim of defamation."). The result should be no different merely because the person doing the false labeling happens to be a religious publisher or broadcaster, and that the group falsely labeled a "cult" happens to be a religious group. Yet the decision of the court below conflicts with the Seventh Circuit's

[5] *See Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773, 776 (Tex. App.—Texarkana 1995, writ denied) ("In these times, a high degree of opprobrium has attached to terms such as 'cultist,' [and] 'occult'. . . . False accusations against or characterizations of persons using those and similar terms, we believe, can certainly be considered to be beyond all bounds of decency and to be atrocious and utterly intolerable in a civilized society.").

holding because it concludes that the term "cult" is religious per se and therefore never actionable. The Court should grant certiorari to resolve this conflict.

III. The Establishment Clause is not implicated in this case because those labeled "cults" in the ECNR were so labeled not merely in the *theological* sense but also in the *secular* sense, and the Local Church's claims are based on the latter not the former.

Unlike in *Sands*, 34 P.3d at 960, where the term "cult" was used exclusively in the *theological* sense, here it was used in the *secular* sense as well. This is revealed by the text of the ECNR itself. The authors make expressly clear that they intend for readers to also interpret the term in the *secular* sense, accompanied by its full contemporary opprobrious force:

> Used properly, the term 'cult' also has particular value for secularists who are unconcerned about theological matters yet very concerned about the ethical, psychological and social consequences of cults... ...a term like 'heretical' [is] irrelevant to many people. While 'spiritual counterfeits' is good, it does not convey the contemporary force of the term cult. But as we considered it more, given its widespread cultural acceptance, we retained the term ['cult'] because, overall, no designation seems quite as accurate or apropos....

ECNR at XXI (emphasis added). Thus, the authors make clear that, unlike in *Sands*, labeling those in the books as "cults" is not merely making "pronouncements of religious belief and opinions." *Sands*, 34 P.3d at 960.

The authors then punctuate the *secular* nature in which they use the term "cult," by ascribing to "cults" abhorrent conduct, not related to religion *per se*, including encouraging prostitution, raping women, molesting children, engaging in drug smuggling, and committing murder. ECNR at XXV.

The Establishment Clause does not bar suits over such allegations of abhorrent *secular* conduct.

The court below relied on quotes that the ECNR Introduction "centers on doctrinal and apologetic issues" and "religious cults" but ignored that the term "cult" is not used exclusively in the *theological* sense. Blanket immunity from defamation liability should not lie merely because a publication contains *some* statements that are protected by the Establishment Clause because they constitute nothing more than expressions of religious belief and opinion, when, as here, the publication also contains *other* statements that clearly fall outside the protection of the Establishment Clause.

While First Amendment protections extend to all expressions of belief and critiques of belief, no such protection obtains when the speech in question consists of reputationally injurious falsehoods whose falsity can be objectively demonstrated without recourse to any theological matter. Such a ruling opens the door to matters of serious concern in the religious community for groups like the Local Church whose members live not only in the United States but also in certain religiously intolerant societies worldwide. In those societies, having abhorrent conduct ascribed to the religious group not only severely damages the group's reputation but could potentially be used by intolerant governments as a justification to persecute the members of that group.

CONCLUSION

For these reasons, amici urge this Court to grant certiorari and reverse the decision of the court below.

Respectfully submitted,

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MAY 2007

(4)

No. 06-1520

IN THE

Supreme Court of the United States

THE LOCAL CHURCH, LIVING STREAM MINISTRY, ET AL.,

Petitioners,

v.

HARVEST HOUSE PUBLISHERS,
JOHN ANKERBERG, AND JOHN WELDON

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

BRIEF FOR AMBASSADOR WINSTON LORD, AMBASSADOR NICHOLAS PLATT, AMBASSADOR BURTON LEVIN, DR. ED IRONS, BETTE BAO LORD, AND SIDNEY RITTENBERG AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Encyclopedia of Cults and New Religions, at xxvii 8

State Department, *Annual Report on International Religious Freedom* regarding "Stigmatization of Certain Religions by Wrongfully Associating Them With Dangerous 'Cults' or 'Sects.'" 6

United States Commission on International Religious Freedom, *2006 Annual Report*, at 110 3

INTERESTS OF THE *AMICUS CURIAE*

Amici submit this *amicus* brief because of the detrimental effect of publications like the *Encyclopedia of Cults and New Religions* ("ECNR") on religious freedom not only in the United States but also in some religiously intolerant societies throughout the world. Amici[1] are individuals who are concerned about restrictions upon religious freedom in China and elsewhere. They call the attention of the Court to the likely infringement of these freedoms where, as in this case, false allegations of criminal or immoral activities are made against groups with members in these countries, such as the Petitioners, which have approximately one million members in China as well as a large number elsewhere.

Submitting *Amici*:

Ambassador Winston Lord

U.S. Ambassador to the People's Republic of China, 1985-1989, under Presidents Reagan and Bush; President of Council on Foreign Relations, 1977-1985; Special Assistant to National Security Advisor Henry Kissinger; Assistant Secretary of State, East Asian Policy, 1993-1997;

Ambassador Nicholas Platt

U.S. Ambassador to the Philippines (1987-1991) and Pakistan (1991-1992), under Presidents Reagan and Bush; Foreign Service assignments in Hong Kong, Beijing and Tokyo; China Analyst at the State Department; Member of National Security Council, Asian Affairs; Deputy Assistant Secretary of Defense, Asian Affairs; Assistant Secretary of State for United Nations Affairs; Executive Secretary, Department of State; President of the Asia Society for twelve years;

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[1] No counsel for any party to these proceedings authored this brief, and no other entity or person aside from the *amicus curiae*, and its counsel, made any monetary contribution for the preparation or submission of this brief.

Ambassador Burton Levin

U.S. Ambassador to Myanmar, 1987-1990, under President Reagan; U.S. Consul General in Hong Kong, 1981-1986 and former top China expert at the State Department; Visiting Professor of Asian Politics at Carleton College;

Dr. Ed Irons

Director of the Hong Kong Institute for Culture, Commerce and Religion; former Professor at the Beijing University of Science and Technology;

Bette Bao Lord

Author and Human Rights Activist;

Sidney Rittenberg

A leading American expert on China who has lived in China for 35 years, 16 as a political prisoner; Founder and President of Rittenberg Associates, Inc.

Amici urge this Court to grant the Petition and review the January 5, 2006 decision of the Texas Court of Appeals reversing the trial court's decision and granting summary judgment to Defendants. We concur with the arguments advanced by Petitioners and other *amici* and write separately to emphasize the potential grave impact of the Texas Court of Appeals' decision upon religious freedoms in countries outside of the United States, such as China.

ARGUMENT

I. A Brief Overview of the Religious Situation in China.

Beginning with its first annual report on religious freedom and persecution in September 1999, the United States Department of State has designated China a "country of particular concern" under the International Religious Freedom Act[2] for "particularly severe violations of religious freedom."[3] That report and subsequent reports detail the Chinese government's actions against Christians and other religious minorities who seek to worship according to their conscience and not within official government confines.

In recent years, this suppression has increasingly fallen upon those religious groups that have not officially registered with the Chinese government. Such groups are broadly labeled as "evil cults,"[4] thereby offering a pretext for the actions taken by the government. The Chinese government looks abroad to help form its definition of a "cult," focusing

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[2] Pub. L. No. 105-292, 112 Stat. 27871 (Oct. 27, 1998), codified in part at 22 U.S.C. 6401, *et seq.* Pursuant to the International Religious Freedom Act of 1998, both the United States Commission on International Religious Freedom and the Department of State are required to publish separate annual reports on religious freedom and persecution.

[3] *See* Department of State, *Annual Report on International Religious Freedom*, 1999.

[4] *See*, for example, United States Commission on International Religious Freedom, *2006 Annual Report*, at 110 ("The campaign against 'evil cults' has, in recent years, expanded beyond the Falun Gong and similar groups to those religious communities that have refused to register and become part of the system of officially-sanctioned religious organizations.... Religious leaders have been imprisoned and followers detained and fined for 'cultist activity'."); Department of State, *Annual Report on International Religious Freedom*, 2005 ("The Government continued its repression of groups that it categorized as 'cults' in general and of small Christian-based groups and the Falun Gong in particular.").

not on theological but societal threats.[5] In a report on cults in the United States issued by China's official Xinhua News Agency, cults are said to "not obey the law, they upset social order, and they create a menace to freedom of religion and social stability. Under the pretence of religion, kindness, and being non-political, they participate in political activities. Some of them even practice criminal activities such as tax evasion, fraud, drug dealing, smuggling, assassination, and kidnapping."[6] By adopting a non-theological working definition of the term "cult," and by raising the possibility of damage to its society, the Chinese government has been able to utilize this term as an effective means of stigmatizing and restricting groups of concern.

The 2005 State Department Report on International Religious Freedom and other reliable estimates place the total number of Christians in China at between 80 and 130 million persons. Included in this number are the government-sanctioned church members registered with the Three-Self Patriotic Movement (Protestant) and the Chinese Patriotic Catholic Association (Catholic), whose combined numbers are estimated at approximately 20 to 25 million persons. The remaining number of Christians, 60 to 105 million, are in unregistered, so-called "house churches." These unregistered "house churches" frequently shoulder the "evil cult" label described previously. Petitioners estimate that there are ap-

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[5] According to an official 1997 White Paper issued by the Chinese government: http://hrw.org/english/docs/2001/04/10/china242.htm, the Chinese government justifies its actions in the following way: "[S]ince the 1980's some pernicious organizations have sprung up in certain areas of China which engage in illegal and even criminal activities under the signboard of religion. Some of the heads of these pseudo-religions distort religious doctrines, create heresies, deceive the masses, refuse to obey the State's laws and decrees, and incite people to overthrow the government."

[6] *Hu Xiaomin*, "Xinhua reports on cults in the United States," Beijing Xinhua Domestic Service. September 10, 2006.

proximately one million local church[7] members in China included in this number of "house churches." Indeed, some scholars have suggested that the "house church" movement originated with the local churches.[8] There is no question that these unregistered "house churches" loosely associated with the local churches outside of China have been restricted and harassed by the Chinese government on the ground that they are antisocial "cults."

II. The Court of Appeals' Reduction of the Term "Cult" to an "Ecclesiastical" Definition, and its Failure to Address the Secular Understanding of "Cult" as Presented in the Encyclopedia of Cults and New Religions, Increases the Threat of Persecution to Christians Residing in Religiously Restrictive Countries such as China that Employ the Term "Cult" in a Secular Sense.

As discussed earlier, the Chinese government takes its cue as to what constitutes a "cult" by looking toward the West since its understanding is shaped by the non-theological dimensions of cults.[9] When a reputable Christian publisher and ostensibly-credentialed authors publish a reference encyclopedia such as ECNR that touts itself as authoritative, well-researched, and devoted to helping identify and expose the 57

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[7] Although Respondents use the collective term "The Local Church" to refer to the Petitioner churches in their book, *Encyclopedia of Cults and New Religions*, the Petitioner churches do not use such a collective term to refer to themselves, but rather refer to each church as a "local church."

[8] Alan Hunter and Kim-Kwong Chan, *Protestantism in Contemporary China*, at 3, n. 3 (Cambridge University Press, 1993) ("The term 'house church' (*jiating jiaohui*) may have originated from the movement founded by Watchman Nee (Ni Tuosheng) in the 1930's, which promoted meetings in private homes led by lay persons."). Watchman Nee is widely recognized as the principal founder of the Local Churches.

[9] *See supra* notes 4 and 5 and accompanying text.

most dangerous cults in the world, governments such as China's,[10] pay close attention. Those seeking excuses to persecute religious minorities will find encouragement from the authors of ECNR. In their introduction they boast, "The approach that we have taken in this Encyclopedia is to illustrate as best we can...that the cults do pose a significant threat to society."[11] The so-called "threat to society," as outlined in the Introduction to ECNR, includes criminal conduct ranging from financial fraud to murder and child molestation. Indeed, any government would be derelict if it did not pay close attention to the societal threats allegedly posed by the groups identified in ECNR.

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[10] At least since 2001, the U.S. State Department has expressed concern in its *Annual Report on International Religious Freedom* regarding "Stigmatization of Certain Religions by Wrongfully Associating Them With Dangerous 'Cults' or 'Sects.'" (A heading in the executive summary of the 2001 version of the report). The 2001 report states: "The governments of a few countries, in an attempt to protect their citizens from dangerous or harmful groups, have adopted discriminating laws and policies. By blurring the distinctions between religions and violent or fraudulent groups, the governments of these countries have disadvantaged groups that may appear to be different or unusual, but are in fact peaceful and straightforward. In all of these countries, existing criminal law is sufficient to address criminal behavior by groups of individuals. New laws or policies that criminalize or stigmatize religious expression can put religious freedom at risk." The section goes on to identify particular instances of such governmental practice in Austria, Belgium, France, and Germany. The State Department followed up with similar sections in its *Religious Freedom* reports for 2002, 2003, 2004, and 2005. Although it is beyond the scope of this brief to detail this European trend, it is important to note that the Chinese government has long used the term "cult" as a pretext for suppression of religious freedoms.

[11] John Weldon and John Ankerberg, *Encyclopedia of Cults and New Religions*, at xxviii (Harvest House Publishers, 1999).

Despite the authors' understanding and use of "cults" to mean groups that "do pose a significant threat to society," the Court of Appeals strangely abridged the definition of "cult" to merely a theological designation. In so doing, the Court of Appeals sanitized the term "cult" from its opprobrious operative use in ECNR and emasculated its forceful secular connotation. Having divorced the term "cult" from its actual usage in ECNR, the Court of Appeals concluded that "being labeled a 'cult' is not actionable because the truth or falsity of the statement depends upon one's religious beliefs, an ecclesiastical matter which cannot and should not be tried in a court of law."[12]

Amici believe this holding is at odds both with better case law throughout the United States[13] and actual practice.[14]

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[12] *Harvest House Publishers, et al. v. The Local Church, et al.*, 190 S.W.3d 204 (Tex.App. – Hous. (1 Dist) 2006).

[13] *Kennedy v. Children's Serv. Soc'y of Wisconsin*, 17 F.3d 980, 984 (7th Cir.1994) ("[I]t is clear that Gaunt's statements that the Kennedys were unsuitable parents because they belonged to a cult could give rise to a claim of defamation."); *Dr. R.C. Samanta Roy Inst. of Science & Tech., Inc. v. Lee Enters., Inc.*, 2006 WL 3692361 (E.D. Wis. 2006) (holding instead that in context before it, the word "cult" could be actionable, and noting that "a decision of the Seventh Circuit, which is binding on this court, holds that stating that one belongs to a cult can give rise to a claim of defamation"); *New Testament Missionary Fellowship v. E.P. Dutton & Co.*, 491 N.Y.S.2d 626, 627-28 (1st Dept. 1985) (holding that book describing cults and oppressive practices of cults was actionable, noting that the publication operated to "tar all the groups covered by the book with the same brush, citing language that is libelous per se"); *Landmark Educ. v. Conde Nast*, 23 Media L. Rep. 1283 (N.Y. Sup. 1994) (holding actionable an article stating that plaintiff is among America's "most wanted cults"); *Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773 (Tex. App. – Texarkana 1995) (being labeled a "cultist" or "cult-like" held actionable). *Tuman v. Genesis Associates*, 935 F. Supp. 1375 (1996) (Plaintiffs sued for slander based on being identified as members of a satanic cult); *Pratt*

Our primary concern is the substantial likelihood that the Chinese government will use the book and the court's ruling as a basis to justify its persecution of house church Christians. By ignoring the actual, secular understanding of the term "cult" as employed by the authors of ECNR and governments such as China's, the Court of Appeals prevented proper adjudication of the book's allegations. The injury is not merely ECNR's libel of the local churches in the United States and abroad. The injury is also the Court of Appeals' unwitting validation of the term "cult," with all of its criminal associations, in its potential application to no fewer than one million local church members, and upwards of 50 to 100 million additional unregistered Christians, in China.

The authors of ECNR recognize and even concede that the practice of categorizing innocent groups in the manner described herein is a reality: "There are many cases in the courts overseas where Christians are treated as if they were cultists."[15] They may not recognize that their inclusion of the local churches in ECNR provides fodder for and lends credence to such treatment. For the sake of tens of millions of Christian believers in China, we implore the Justices of the United States Supreme Court to recognize the important interests at stake in this case and grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted not only for the reasons submitted by the Petitioners but also because of the potential adverse impact of the decision below

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v. Nelson, 127 P.3d 1256 (2005) (dismissed on other grounds different from the term "cult" being one of "religious opinion"). *But see Sands v. Living Word Fellowship*, 34 P.3d 955, 959-60 (Alaska 2001) (holding, "[i]t is not factually verifiable whether a certain church is a 'cult' or whether church members are 'cult recruiters.' Instead, these are statements of religious belief and opinion");

[14] *See* text, *supra*, at notes 5 through 7.

[15] *Encyclopedia of Cults and New Religions*, at xxvii.

upon freedoms of religion in other countries, including China.

Respectfully submitted.

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IN THE

Supreme Court of the United States

THE LOCAL CHURCH, LIVING STREAM MINISTRY, ET AL.,

Petitioners,

v.

HARVEST HOUSE PUBLISHERS, JOHN ANKERBERG AND JOHN WELDON,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

BRIEF OF VARIOUS PUBLISHERS, BROADCASTERS AND RELIGIOUS ORGANIZATIONS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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II. The appellate ruling below and other cases like it raise the disturbing specter of adverse effects on religious freedom in this country through: religious groups not having full access to the justice system and disparate treatment of defamatory statements depending on whether they occur in a religious or secular medium. 8

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INTERESTS OF THE *AMICUS CURIAE*

Under Rule 37 of the United State Supreme Court Rules of Appellate Procedure, Amici file this brief in support of Petitioners The Local Church, et al.'s Petition for Certiorari. Amici[1] are various religious organizations, scholars and denominations with an interest in maintaining the proper balance between the Establishment Clause and other constitutional doctrines that recognize religious immunities for our organizations.

Amici:

1. Methodist Federation for Social Action, Washington D.C.;
2. John Van Diest is senior editor with Tyndale Publishing;
3. J. Gordon Melton, Ph.D., Author, Ordained United Methodist Minister, Founder and Director of Institute for the Study of American Religion, Santa Barbara, California;
4. Peter Kerridge is Chief Executive of Premier Media Group;
5. Robert Oppedisano, Director, Fordham Press;
6. Jon Yinger is President of Midwest Christian Broadcasting.

This balance must be maintained while protecting and enabling our organizations to enjoy equal treatment and equal protection on par with similarly situated secular organizations through the appropriate application of neutral principles of law to our legal claims in the courts. Amici are concerned with overbroad readings of the Establishment Clause that threaten these rights for all religious organizations whether large or small.

Amici urge this Court to grant review.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission

INTRODUCTION AND SUMMARY OF ARGUMENT

Overbroad readings of the Establishment Clause by various federal and state courts who duck legal disputes involving religious organizations because of purportedly doctrinal premises or because the suits involve mixed allegations of doctrinal heresy juxtaposed with criminal or non-theological contentions can have the deleterious effect of placing religious organizations on a lower rung of protection than similarly situated secular organizations. This result effectively deprives religious organizations of an equal opportunity to enforce their properly litigable claims in courts depriving them of equal protection of the law for claims that in any other context outside of religion would be actionable. Amici implore this Court to address the ruling below and provide guidance to lower courts in dealing with the perplexing conflicts that arise when adjudicating disputes involving religious organizations in the context of the Establishment Clause as it intersects with other clauses of the First Amendment – particularly free speech. Otherwise religious organizations will face the two-fold insolubility of being disadvantaged in the courts when attempting to enforce their legal rights while secondly, having the unintended and detrimental effect of having their religious freedom impinged upon through overbroad readings of the Establishment Clause.

ARGUMENT

I. The two jurisprudential extremes under which causes of action are permitted under the auspices of the Establishment Clause serve as the guideposts from which this Court must strike an appropriate balance recognizing the rights of religious organizations to properly assert their legal interests in harmony with the Establishment Clause while preserving the free speech rights of others.

At the outset, it should be noted that amici are not advocating for a change from the long established principle that under the Establishment Clause of the First Amendment, civil courts are prohibited from deciding theological matters or interpreting religious doctrine, or making matters of religious belief the subject of tort liability. *See Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 707, 96 S.Ct. 2372, 2379, 49 L.Ed.2d 151 (1976).[2] In fact, amici also share an unwavering commitment to this crucial legal tenet and acknowledge the immunities and implications that arise out of this sacred bedrock principle of constitutional jurisprudence first outlined back in 1872 by this Court.[3] This is because courts that entwine themselves in such disputes unwittingly bring the power of the state to bear in determining the veracity of specific religious faiths thus 'establishing' religion and eliminating the constitutionally mandated divide of separation of church and state. As this Court ruled in a previous case, the Establishment Clause's prohibition emanates from the concern that powerful religious sects 'might bring about a fusion of governmental and religious functions ... to the end that official support of the state or federal government would be placed behind the tenets of one or all orthodoxies.' *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

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[2] *See also United States v. Ballard,* 322 U.S. 78, 86, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944): 'The First and Fourteenth Amendments of the United States Constitution prohibit civil courts from deciding such ecclesiastical matters.'

[3] *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872).

Conversely, lawsuits between religious organizations are not simply automatically non-justiciable under the Establishment Clause. To wit, courts do not 'establish,' promote or work to the deterrence of religion by deciding non-theological questions that arise in religious or quasi-religious contexts. If controversies between church members or disparate religious factions can be resolved through the application of *'neutral principles of law,'* courts may hear them without offending the First Amendment. *See, e.g., Gonzalez v. Archbishop*, 280 U.S. 1 (1929). The mandate of neutrality is respected when the government, following neutral criteria and evenhanded policies, extends benefits to religious adherents on the same terms as non-religious adherents. Religious groups are as much entitled to the protections of the neutral principles of defamation as non-religious groups. *See Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947). It is well settled, for example, that controversies among church members/religious bodies over the ownership of church property may be resolved by the courts if the resolution does not entail inquiry into ecclesiastical doctrine, rules or practices.[4] The courts may also resolve disputes concerning contractual entitlements of church employees.[5]

However, the bright line principles that serve as the touchstone for so many landmark decisions by this Court over the years are harder to apply in the context of disputes

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[4] *See, e.g., Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

[5] *See Waters v. Hargest*, 593 S.W.2d 364, 365 (Tex.Civ.App.-Texarkana 1979) ('The first amendment to the United States Constitution prohibits the civil courts from exercising jurisdiction over purely ecclesiastical matters involved in church related disputes, but it does not forbid those courts from adjudicating property rights of the church or of the members, so long as such rights can be determined by the application of neutral principles of law . . . Contractual rights are 'property rights' within the meaning of the rule.') (citations omitted); *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980), *cert denied*, 453 U.S. 912, 69 L. Ed. 2d 994, 101 S. Ct. 3143 (1981) ('That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern.')

involving allegations of *both* theological and non-theological matters (*i.e.*, doctrine and conduct). In fact, inconsistent and faulty application of the Establishment Clause principles denoted above actually tilt the balance of religious freedom *against* religious organizations by cutting off properly filed causes of action simply *because* the dispute involves religious organizations or has some *doctrinal* component to it.

For example, a vulnerable area of the law where this danger exists is sublimely illustrated by the case at bar — how should courts resolve religious disputes in the defamation arena when charges of heresy and doctrine are interspersed with allegations of criminal conduct and practices? This confusing context led the Court below to automatically assume that the case was a routine Establishment Clause case holding that the term 'cult' as defined in the publication was the end all and be all of the case in ultimately deciding that the case should be terminated the first Establishment Clause principle noted above regarding doctrine. Insight into the reasoning of the lower court is gleaned from the following excerpt from the Opinion below and is fairly typical of courts that have reasoned this way in the face of charges imputing untoward doctrinal beliefs *and* criminal or immoral conduct towards persons or entities in the religious milieu:

> In their motion, the publisher and authors claim that the Introduction 'centers on doctrinal and apologetic issues.' We agree. Under the Establishment Clause of the First Amendment, civil courts are prohibited from deciding theological matters, or interpreting religious doctrine, or making matters of religious belief the subject of tort liability. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 707, 96 S.Ct. 2372, 2379, 49 L.Ed.2d 151 (1976).... As such, no jury can be allowed to determine [the truth or falsity of one's religious beliefs] for '[w]hen triers of fact undertake that task, they enter a forbidden domain.' *Id.* at 680 (quoting *United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944).... The First and Fourteenth Amendments of the United

> States Constitution prohibit civil courts from deciding such ecclesiastical matters. *Id.* at 743.
>
> Therefore, we conclude that being labeled a 'cult' is not actionable because the truth or falsity of the statement depends upon one's religious beliefs, an ecclesiastical matter which cannot and should not be tried in a court of law. *See Sands v. Living Word Fellowship*, 34 P.3d 955, 960 (Alas.2001) (holding that reference to church as 'cult' and church member as 'cult recruiter' not actionable as defamation because statements convey religious belief and opinion and are not capable of being proven true or false). *Local Church, et. al vs. Harvest House*, 190 S.W.3d 204, 211 (2006).

Amici vehemently disagree with the key underpinning of the Court's reasoning provided above — based on an assumption that the publication was 'religious' or 'doctrinal,' the Establishment Clause operated to cut off any defamation liability on the part of the defendant religious publisher.

Instead, a closer examination of the written publication that was the subject of this litigation unveils that this case rests at the vexing intersection of an often beguiling area of Establishment Clause jurisprudence and an often misunderstood set of common-law defamation principles. While the present case may appear to be a straightforward example of protecting the freedom of a religious entity to criticize another, closer examination of the accusations painted in the book text against the so-called religious groups listed therein reveal otherwise.

The Court of Appeals reacted in a knee-jerk fashion to the Establishment Clause issues implicated by this litigation, reaching the erroneous judgment that the Establishment Clause eviscerated the plaintiffs case without any consideration of whether the non-theological attributions and criminal characterizations made by the authors concerning the word 'cult' in their Encyclopedia of cults could be defamatory of the groups listed and included in the book.

Determining whether a defamatory statement may serve as the predicate for an action in damages depends on balancing the First Amendment's vital guarantee of free and uninhibited discussion of public issues with the important social values that underlie defamation law and society's pervasive and strong interest in preventing and redressing attacks upon reputation. *Milkovich v. Lorain Journal Co.*, 497 US 13. Actually, as noted in *Milkovich*, '[S]tatements that contain or imply assertions of provably false facts [even if given under the guise of opinion] will likely be actionable.' *Id.*

For instance, a glance at the back cover of the publication at issue in this case *Encyclopedia of Cults and New Religions* ("ECNR") clearly indicates the book is not mere religious opinion – the book advertises itself as having: 'up-to-date facts'; is a 'valuable reference book'; an 'Encyclopedia' authored by a 'highly respected research team' with 'advanced degrees.' ECNR, in its Introduction, attributes to 'cults' doctrinal errata but then goes beyond this to define objectively verifiable characteristics of cults which 'beat' their disciples, cause 'physical' harm, and practice 'financial fraud in fundraising and financial costs.' Indeed, it goes even further listing criminal and immoral practices that are found in even the most 'respectable cults' including murder, human sacrifice, child molestation, rape, drug smuggling, and prostitution without attributing any of these practices to any specific group.

Obviously, if the book only addressed 'doctrinal and apologetics' issues, the authors would not have needed to acknowledge concerns about potential 'legal problems' with the publication.[6] But herein lies the conundrum faced by this Court — when publications like ECNR imbibe its groups with doctrinal and apologetics issues *and* contentions of criminal conduct — which in this case purport to be the 57 groups with the most 'social influence' in society, should the Establishment Clause operate to bar such actions which in any other legal construct would be actionable? We think not. Unsupported criminal accusations aimed at individuals or

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[6] ECNR, pp. XXVI-XXVII.

identified groups[7] constitute defamation per se irrespective of the kind of book it appears in.[8]

By glossing over and ignoring the non-theological characterization of the term 'cult' in ECNR, and ruling that 'cult' — a sociological word defined to include attributions of criminal behavior — is solely 'ecclesiastical' and not capable of defamatory meaning, the Court of Appeals' decision raises serious concerns about enhancing free speech for certain groups at the expense of others. This extravagant over-reading of Establishment Clause principles led the lower court to a devalued under-reading of ordinary defamation law principles. Once the Court of Appeals erred with the Establishment Clause, it erred on the entire ruling. The ruling is, consequently, excessive and reflects a fundamental misunderstanding of why civil courts stay out of doctrinal issues. Furthermore, it functions to deprive religious organizations of protections civil law affords to other organizations such as provably false statements of fact that would in any other context be actionable.

II. The appellate ruling below and other cases like it raise the disturbing specter of adverse effects on religious freedom in this country through: religious groups not having full access to the justice system and disparate treatment of defamatory statements depending on whether they occur in a religious or secular medium.

The expansive treatment of the Establishment Clause engaged in by the court below and other courts[9] will do genu-

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[7] Lloyd J. Jassin and Steven C. Schechter, *The Copyright Permission and Libel Handbook: A Step-by-Step Guide for Writers, Editors, and Publishers* (New York: John Wiley & Sons, Inc., 1998), p. 136.

[8] *Id.*, p. 130.

[9] *Cha v. Korean Presbyterian Church of Washington*, 262 Va. 604, 615, 553 S.E.2d 511, 516 (2001); *Rasmussen v. Bennett*, 228 Mont. 106, 741 P.2d 755, 758-59 (1987); *Hadnot v. Shaw*, 826 P.2d 978 (Okla.1992) the Supreme Court of Oklah. *See also O'Connor v. Diocese of Honolulu*, 885 P.2d 361, 368 (Haw. 1994); *Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America*, 64 F.3d 664 (6th Cir. 1995);

ine damage to religious freedom in this country in at least two ways:

First, for religious freedom to flourish, religious groups must have full and complete access to all the rights and remedies of ordinary litigants. Religious freedom is dependent on the rule of law, and neither religious freedom nor the rule of law is served by understandings of the First Amendment that disqualify religious groups from resort to the courts for redress for ordinary libels. If a religious group is defamed by factual allegations that would be actionable when brought by any other 'non-religious' plaintiff—if a religious group is accused, for example, of murder or kidnapping or financial fraud—then the rule of law and the neutrality required by the First Amendment mandate that the religious group have the benefit of the same legal rights and privileges that would apply to any other plaintiff. These are precisely the issues posed by this case. Their thoughtful and thorough exploration and resolution require more than the rushed analysis of the Court below.

One may understand why this Court would not feel compelled to fine-tune every nuance of the complex law of defamation by granting review each time a lower court interprets or applies some difficult defamation concept. But here, any fair reading of what happened below makes it clear that the lower court's compound errors in its application of defamation principles emanated from its over-arching error in its understanding of First Amendment law. The Establishment Clause of the First Amendment does not supersede the care-

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Paul v. Watchtower Bible and Tract Society of New York, Inc., 819 F.2d 875, 881-83 (9th Cir. 1987). Compare, *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404 (Iowa 2003), *cert. denied*, 540 U.S. 977 (2003);*Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160 (1985); *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Pa. 1975); *Lipscombe v. Crudup*, 888 A.2d 1171 (D.C. 2005). As can be seen from the stark divergence of decisions on both sides of the issue, this Court's guidance is much-needed. The Court's intervention will serve the national interest in sound application of the First Amendment, and serve the interests of churches and religious organizations in supporting access to fairly applied application of defamation laws in a religious context.

ful balance between the protection of reputation and the encouragement of free expression that has been struck under the Free Speech Clause of the First Amendment.

Secondly, this Court is encouraged to grant review because of its impact beyond this case-specific error. By holding, *as a matter of law*, that when the word 'cult' appears in a text that is primarily religious in content, it is *never* susceptible to a defamatory interpretation — regardless of the specific context in which it appears and regardless of the objective caricature assigned to it — the Court of Appeals created a precedent that *violates* the Establishment Clause by favoring publishers of religious texts over publishers of secular material. *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947). This precedent could result in a different (lower) standard of defamation for religious publishers and broadcasters than for secular media, when commenting on Christian churches and ministries based on a shortsighted analysis which effectively holds that, under the rubric of 'cult as a religious term,' (or any other allegedly religious code word) religious authors and their publishers can paint[10] churches and ministries with accusations of secular criminal conduct – accusations that would in any nonreligious context be actionably defamatory.[11] In essence, the court held that the

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[10] Undeniably, ECNR itself asserts, **'a far darker picture could have been painted.'** ECNR, p. IX.

[11] Consider the Texas (and other states courts') confusion with the actionability of the word cult. Compare *Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773 (Tex.App. – Texarkana 1995) (implicating the potential actionability of the term 'cultist' vis a vis the case at bar here. *See also*, *Landmark Education v. Conde Naste*, 1994 WL 836356 (N.Y.Sup.) (1994) **(term 'cult' is actionable if defined in terms of conduct)**; *NT Missionary Fellowship, v. E.P. Dutton & Co., Inc.*, 112 A.D. 2d 55 (1985) ('tarring groups with the term 'cult' can give rise to a defamation action); and *Kennedy v. Children's Service Society of Wisconsin*, 17 F. 3d 980 (1994) (adoptive parents identified as being in a 'cult' could bring suit for defamation); *Tuman v. Genesis Associates*, 935 F. Supp. 1375 (1996) (Plaintiffs sued for slander based on being identified as members of a satanic cult); *Pratt v. Nelson*, 127 P.3d 1256 (2005) (dismissed on other grounds but not based on the term 'cult' being one of 'religious opinion'). But *see also*, *Sands vs. Living Word Fellowship*, 34 P. 3d. 955 (2001) (dispute between religious groups over recruitment of an individ-

'neutral principles' of defamation law which apply to speech that occurs outside a religious context are inapplicable to statements of fact that appear in religious texts — even when those statements do not implicate religious matters. By this reasoning, the publisher of a primarily 'religious' text can choose a code-word like cult — define the word in terms of abhorrent characteristics and tar any disfavored group or person by referring to the group with the code-word. Then, regardless of the falsity of the characteristic, the publisher could claim 'religious immunity' because its publication 'centers on doctrinal and apologetic issues' and the reasoning that courts may not consider the customary defamation[12] but must find the speech 'non-defamatory,' based on Establishment Clause grounds. This reasoning is without precedent and extends the protection of the Establishment Clause to non-religious speech in religious texts – a result that is unprecedented from all of the leading cases that addressed religious questions. *See, e.g., Serbian Eastern Orthodox Diocese v. Milivojevich, et al.*, 426 U.S. 696 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

Finally, amici are concerned about critics who can now paint groups with whom they disagree theologically with the secular attributes associated with 'cults' without accountability to libel laws. The court has, in effect, provided a legal 'assist' to religious authors and publishers not presently enjoyed by secular ones. Under the Free Speech Clause, there is no question that this case would appropriately be sent to a jury if the plaintiff was *not* a religious group. It is an offense to the First Amendment to disqualify a plaintiff from the shelter of the rule of law that it would otherwise enjoy merely because it *is* a religious group. The potential long-term effect will be for defamation to become acceptable prac-

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ual – action for slander would not lie for use of the term cult based on religious belief).

[12] The challenged statements must be construed in the context of the work as a whole, their diction and syntax must be considered and they must be tested to determine their susceptibility to being proved true or false *Milkovich v. Lorain Journal Co.* 497 U.S. 1 (1990).

tice in the normal discourse of religious speech and for the delicate balance between free speech and the reputations of others to be sloped in favor of powerful majority voices who can potentially denigrate their competition in the marketplace of ideas by vilifying them under the guise of 'religious' doctrine thereby inhibiting genuine religious discourse.

As in secular publishing, the greatest power in religious publishing is wielded by large, well-established, resource-rich entities. Almost by definition, major publishers tend to advance the views of the mainstream and promote like-minded, majority views over minority or religious organizations. *Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310, 1325, 89 L. Ed. 2d 478 (1986) (Brennan, J., dissenting), *superseded by statute*, 10 U.S.C. § 774(a)-(b), as recognized in *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) ('A critical function of the Religion Clause of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant because unfamiliar. It is the constitutional role of [the courts] to ensure that this purpose is realized.'); *Engel v. Vitale*, 370 U.S. 421, 431, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962) ('When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.'); *Torcaso v. Watkins*, 367 U.S. 488, 495, 81 S. Ct. 1680; 6 L. Ed. 2d 982 (1961) ('Neither [a State or the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.').

Armed with the special insulation from defamation liability that the lower court's ruling affords to religious publishers, these entities are enabled to wage devastating misinformation campaigns against religious groups with whom they disagree. Such campaigns would have a severely damaging effect on emergent religions that have neither the numbers nor the resources to defend against them. In this

way, the ruling below and others like it actually inhibit the *free exercise* of religion. Both religious and secular organizations should be afforded the opportunity to have their justiciable causes of action adjudicated under neutral principles of law, both organizations should be subject to the same legal standard of defamation and both organizations should enjoy the same protections from defamation when falsely accused of criminal or abhorrent conduct.

It should be noted, also, that reversing the lower court ruling and other rulings like it will not have a chilling effect on the First Amendment rights of any publishers or broadcasters because reversal would merely conform to existing defamation law, properly balancing one's freedom of speech with one's right to retain their reputation, regardless of religious persuasion or lack thereof. If these types of decisions are not reversed, churches and ministries, but not secular organizations, can be stained with libelous accusations as long as they occur within a purportedly religious context as a cloak for defamation. This will damage the free practice of religion in our country and abroad, allowing accusations to be made in the religious sphere that would not be tolerated by the courts outside of a purported religious context and making the courts an ally of those who seek to limit the freedoms of others. While we are understandably concerned about any unnecessary restriction of freedom of speech, we are also concerned about irresponsible practices by religious publishers and broadcasters. Merely because a publication or broadcast is made in the 'religious' context, does not mean that a publication or broadcast should enjoy blanket immunity from the laws of libel. An appropriate balance is necessary. This case provides an ideal vehicle to define that balance. For the sake of minority religious voices that deserve to be heard, we pray the Court will grant review and strike the appropriate balance between the important competing interests at stake in this case. As Justice Stewart noted in *Rosenblatt v. Baer,* 383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966):

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential

> dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.

We, as religious organizations unaffiliated with either party in this suit and with no stake in the outcome of this litigation per se, are gravely concerned about this decision because it has consequences not just for the litigants but for the practice of religion in this Country and beyond. It is not just a localized or politicized problem in Texas but a national (and international) difficulty that must be addressed for a fitting balance to be struck between religious practice and religious freedom in this country. As such, we ask this Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2007

(3)

No. 06-1520

IN THE

Supreme Court of the United States

THE LOCAL CHURCH, LIVING STREAM MINISTRY, ET AL.,

Petitioners.

v.

HARVEST HOUSE PUBLISHERS, JOHN ANKERBERG AND JOHN WELDON,

Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals

BRIEF OF VARIOUS RELIGION SCHOLARS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

Under Rule 37 of the United State Supreme Court Rules of Appellate Procedure, Amici file this *amicus curiae* letter brief in support of Petitioners The Local Church, et al.'s Petition for Review.[1] Amici are various scholars in the fields of religion, sociology and psychology who study the doctrinal and social differences among religious groups:

Ronald B. Flowers, Ph.D., Author, Professor Emeritus of Religion at Texas Christian University, Fort Worth, Texas.

H. Newton Maloney, Ph.D., Author, Senior Professor of Psychology, Department of Clinical Psychology, at Fuller Theological Seminary, Pasadena, California.

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William L. Pitts, Ph.D., Author, Professor of History of Christianity and Director of Graduate Studies, Department of Religion, Baylor University, Waco, Texas.

Father John A. Saliba, Ph.D., S.J., Author, Professor of Religious Studies at University of Detroit, Mercy, Detroit, Michigan.

Rodney Stark, Ph.D., Author, Co-Director, Institute for Studies of Religion and University Professor of the Social Sciences, Baylor University, Waco, Texas.

Mark G. Toulouse, Ph.D., Author, Professor of American Religious History at Brite Divinity School, Texas Christian University, Fort Worth, Texas.

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[1] Written consent was granted by the Respondents to file this amicus brief. No counsel for any party to these proceedings authored this brief, in whole or in part and no entity or person besides the amici curiae and their counsel, contributed monetarily to the writing or filing of this brief.

Stuart A. Wright, Ph.D., Author, Professor of Sociology and Assistant Director for Research and Sponsored Programs Administration, Lamar University, Beaumont, Texas.

Edwin S. Gaustad, Ph.D., Author, Professor Emeritus of History and Religious Studies, University of California-Riverside.

James M. Dunn, Ph.D., Author, Visiting Professor of Christianity and Public Policy at Wake Forest Divinity School, Former Executive Director of Baptist Joint Committee on Public Affairs.

Amici are especially well acquainted with the religious and secular meanings of the word "cult," as well as with the negative effects that the "cult" label has on the social acceptance of minority religious groups such as Petitioners, especially when combined with general accusations of criminal activity. Amici are concerned that the ruling of the Texas Court of Appeals, which rendered the word "cult" capable exclusively of a religious meaning – apart from any reference to the context of the accusation – will have a devastating effect on the diversity of religious expression practiced in the United States because it affords the dominant groups (religious or otherwise) in society, and others, a government-approved means by which they may freely defame newer or smaller groups. This, amici contend, is an indirect establishment of the dominant religions by the courts, which is impermissible under the First Amendment. Amici are also concerned that, by stretching the "ecclesiastical abstention" doctrine beyond intra-church disputes to apply to situations where a harmed denomination is not part of, and does not consent to be governed by, the ecclesiastical structure of the tortfeasor denomination, the Texas Court violated both Religion Clauses of the First Amendment and destroyed the consent requirement for the doctrine, thus enabling religious groups to freely harm non-consenting non-member individuals without fear of government interference or tort liability.

In the long run, the effects of this ruling will greatly damage religion in the public eye.

Amici urge this Court to grant review.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Establishment Clause and Free Exercise Clause of the First Amendment serve to protect minority religions and the public from the imposition of a state-sponsored or favored religion. Sometimes, however, in their determination to avoid all things religious, state and federal courts may neglect their duty to adjudicate properly justiciable claims between disputants of differing religious affiliations, as with the present case. The sting of this miscarriage of justice is occasionally felt not only by the wronged party, but – by setting a damaging precedent – by all of society.

Here, the lower court issued a ruling that favored the larger, currently prevailing religious denominations and harmed all newer and smaller religious denominations by two distinct violations of the Establishment Clause. First, by holding that a word known to have both secular and religious implications – "cult" – is religious per se and incapable of secular defamatory meaning, regardless of context attributing the most abhorrent criminal and social conduct to "cults," the judicial apparatus of the state created a very effective weapon whereby majority religious groups that are already approved by society may defame newer and smaller groups out of existence, thus establishing the current hegemony of major religious denominations as those favored by the state.

Second, in order to reach its holding, the lower court made improper use of the "ecclesiastical abstention" doctrine and treated Petitioners as if they were consenting members under the ecclesiastical authority of Respondents' denomination or ministry, which they were not. This improper application of the ecclesiastical abstention doctrine effectively established Respondents' religion as Petitioners' and deprived Petitioners of their free exercise rights. If the ecclesiastical abstention doctrine is stretched to apply to disputes between members of different denominations, then "implied consent" is no longer an underlying rationale and religious organiza-

tions will be free to act in ways that harm individuals without their consent.

ARGUMENT

I. In ruling that the word "cult" is incapable of defamatory meaning, regardless of context which attributed criminal behavior to "cults," the Texas Court of Appeals violated the Establishment Clause of the First Amendment to the Constitution and damaged the diversity of religious expression that is a bulwark of our society.

Amici are concerned that the overbroad ruling of the Texas Court of Appeals (the "Texas Court"), which assigned the word "cult" a purely religious meaning apart from any analysis of the context of the accusation, will have severe negative consequences upon the health and diversity of religious life in the United States and abroad. Amici's professional studies and years of experience in the field form the basis of their concern. At issue is whether men may squelch and render nugatory particular religious expression with which they disagree by means of hurling a "brick" of otherwise defamatory accusations through the proverbial stained glass window of their opponent and escape liability merely by attaching a note ascribing the conduct to a "cult." This is what amici believe occurred in the instant case.

In order to arrive at its ruling that the accusations contained in Respondents' book, the *Encyclopedia of Cults and New Religions* (*"ECNR"*), are not defamatory with respect to Petitioners, the Texas Court wrongly employed a method of analysis that separated the word "cult" from its context. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 24 (1990) (among the circumstances to be scrutinized by a court in a defamation action are "the type of language used, the meaning of the statement *in context*, whether the statement is verifiable, and the broader social circumstances in which the statement was made") (emphasis added) (Brennan, J., *dissenting* as to the result, but summarizing and agreeing with

the First Amendment principles employed by the majority). The Texas Court first held that the word "cult" was purely religious per se and could not impute any secular meaning.[2] Then, it went on to decide that the abhorrent anti-social and criminal accusations that were generally ascribed to cults in the book – and which provided the context for the book's discussion of cults – were not themselves applicable to Petitioners because they were not specifically alleged to be "of and concerning" them.

Amici are concerned that the ruling of the Texas Court provides a way for intolerant religious zealots to stifle the free and diverse religious practice that has been at the core of our nation's identity since its founding. This Court stated in *United States v. Ballard*, 322 U.S. 78, 87 (1944) that:

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views.

However, since no reasonable person would want to be identified within his community as a "cult" member, as if he were a follower of Jim Jones or some other well-known "cult" figure, and since the lower court ruling allows for those in well-known religious groups to so label those in smaller religious groups, amici believe that the lower court ruling provides a vehicle for the intolerant among us to engage in a "back door" attack upon religious sects with whom

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[2] Amazingly, despite the court's stated position that it could not decide religious matters, it felt free to decide the definition of the word "cult" – adopting Respondents' definition as the basis for its ruling – without making a single reference to any objective religious authority supporting or dictating its definition of the term. Harvest House Publishers v. The Local Church, 190 S.W.3d 204, 211-212 (Tex. App. 2006).

they disagree. While they might not enlist the government to shut down their religious opponents, they might yet rather silence them by hurling false criminal accusations at a religious group such that it and all its members are rendered pariahs – all while the government turns a blind eye at what would otherwise be actionable as defamation.

II. Contrary to the ruling of the Texas Court, the word "cult" carries a secular, potentially defamatory meaning, and this secular meaning was highlighted by the context of the accusation in ECNR.

As scholars in the field of religion, amici aver that – as a matter of fact – the word "cult" has a secular meaning as well as a purely religious meaning. In purely religious terms, a cult may be defined to be a false, unorthodox, or extremist religious sect. *See Webster's Third New International Dictionary*, 552 def'n 4 (Philip Babcock Gove ed., Merriam Webster 1981). By this definition, some Southern Baptists, for example, might refer to the Amish as a cult – citing their extremist position in abstaining from technological advances in society as being beyond, and perhaps contrary, to the requirements of the Bible in which both groups believe. Because courts are not allowed to determine what is true, orthodox, or normative in religion, this usage of the word "cult" is and ought to be non-actionable. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976).

However, due to the atrocities committed by such groups as Jim Jones and the People's Temple at Jonestown, and Marshall Applewhite and the Heaven's Gate group in San Diego, the word "cult" has picked up a secular meaning associated with dangerous, deviant and criminal behavior, including abduction, brainwashing, fraud, physical assault, sexual abuse, suicide and murder. In fact, among the general population, the word is more strongly associated with its

secular meaning.[3] Consider, for example, Wikipedia's explanation of the term:

> In common usage 'cult' has a negative connotation....This popular use of the term has gained such credence and momentum that it has virtually swallowed up the more neutral historical meaning of the term....

http://en.wikipedia.org/wiki/Cult (citing James T. Richardson, *Definitions of Cult: From Sociological-Technical to Popular-Negative*, 34 REVIEW OF RELIGIOUS RESEARCH 348 (1993)).

Moreover, the *Random House Unabridged Dictionary* (2005), in addition to listing numerous religious meanings of the word "cult," lists several secular meanings, including: "An instance of veneration of a person, ideal, or thing, esp. as manifested by a body of admirers"; "a group or sect bound together by veneration of the same thing, person, ideal, etc."; a "group having a sacred ideology and a set of rites centering around their sacred symbols"; and "any system for treating human sickness that originated by a person usually claiming to have sole insight into the nature of disease, and that employs methods regarded as unorthodox or unscientific." To illustrate the significance of the secular meaning of the word "cult," consider that the Order of Skull and Bones, the secret society based at Yale University whose membership includes current President George W. Bush, former Democratic Presidential nominee John Kerry and former President and U.S. Supreme Court Chief Justice William Howard Taft, is sometimes called a "cult." Given the ruling by the Texas Court of

[3] Because mere use of the word "cult" to describe a group elicits negative, stereotypical images before any factual information about the group has been obtained, the use of the term as a descriptor in academic literature is often seen as an ethical breach for modern social scientists and many scholars have advocated dropping its use altogether. See James R. Lewis, The Encyclopedia of Cults, Sects & New Religions, 22 (Prometheus Books 1998).

Appeals, any member of that society accused of belonging to a "cult" could bring an action for defamation since the society is clearly secular. Yet Petitioners, also accused of being a "cult," are stripped of any right to protect their dignity and status solely because the groups with which they are affiliated are "religious." This is manifestly unfair and nonsensical.

The escalating negative secular meaning of the word "cult" is due primarily to the work of two groups: the "anti-cult movement" and the media. The so-called "anti-cult movement" is comprised of mostly secular organizations and individuals united by their opposition to groups they consider to be "cults." *See* Mircea Eliade, *Encyclopedia of Religion*, 2d ed., Vol. 10, 395 (MacMillan Publishing Co. 1987. These "anti-cultists" have been successful, along with a media hungry for sensationalist topics, in convincing the general public of the danger of "cults" by using events like Jonestown and Waco to create stereotypes and fuel public fear that the crimes and depravity of a few groups are characteristic of all groups labeled "cults," thus creating an "anti-cult mythology." *ECNR* employs the same fear-mongering tactics.

Amici contend that when a group is labeled a "cult" in a context that gives the word a secular meaning, that label does in fact lower the labeled group and its members in the eyes of secular society and creates an attitude of repugnance toward the group. Hence, if there is something in such a secular cult-related allegation that is not true, the use of that label should afford a basis for a cause of action for defamation.

Given that use of the term "cult" in scholarly and lay publications, such as *ECNR*, can impart either a religious meaning or a secular one – or both – depending on the context in which the term is applied, the Texas Court committed a grave error by surgically removing the word "cult" from the context of *ECNR*, for, apart from its context, it is impossible to determine whether it is being used in a purely religious

sense or in a way that calls to mind the secular meaning of the word.

An examination of context, however, reveals that *ECNR did* invoke the secular meaning of the word "cult." Although *ECNR* engaged in discussion related to the religious[4] meaning of the word, it did not use the word only in the doctrinal sense; it also implied secular wrongdoing on the part of every group in the book. It stated that every group mentioned therein deserved the title "cult"; it repeatedly called the reader's attention to the example of Jim Jones; it specifically identified several criminal and abhorrent acts such as fraud, drug-smuggling, prostitution, rape, physical beating, molestation of children, and murder as being practices generally ascribed to "cults"; and then it implied that Petitioners were particularly worthy of the "cult" designation, including the secular wrongs described, because they were among only 57 so-called cults selected for inclusion in the book from the "5000 cults [that] exist worldwide" according to the authors.[5] Lest any question remained whether a reasonable reader could understand that the word "cult" was being used in a secular sense, the book specifically stated that the term "cult," as used by Respondents, has "value for *secularists* unconcerned with theological matters yet very concerned about the consequences of cults.[6] (Emphasis added). By ignoring the potential and, in fact, *intended* secular meaning of the word, the Texas Court has, by its decision, armed future religious disputants with a weapon whereby they may freely defame the character of other religious groups and individuals with the most heinous accusations as long as they associate those abominable traits with being part of a "cult."

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[4] *I.e.* – the groups mentioned in the book were accused by the authors of being wrong in their religious doctrines.

[5] ECNR, pp. XII, XVI.

[6] Id. p. XXI.

Amici are well-acquainted with the negative social consequences that accompany non-specific accusations of being a "cult." Using "cult" as a code word to impute crimes and immorality to groups labeled as cults, as was done here in *ECNR* has been a topic of concern for Christian apologists and secular scholars who write about religious movements and the social consequences that result from using the term in that fashion. Minority religions will lose their chance at a fair hearing as soon as the *ECNR* label "cult" is successfully applied to them. Using the word "cult" to describe any religious group dehumanizes the group's members and their children. It strongly implies that the group members are social deviants, crazy, brainwashed and duped by their leader(s). It is virtually impossible for such small religious organizations, regardless of the true nature of their religious beliefs and practices, to rid themselves of the stigma of such an opprobrious label. Furthermore, because "cults" are commonly seen as dangerous, society-at-large and even family and friends of a person branded with the "cult" label frequently withdraw their affections from him.

III. The term "cult" is legally capable of defamation, and this case should therefore have been presented to a jury.

As this Court's recent rulings on displays of the Ten Commandments illustrates, context is key to Establishment Clause jurisprudence. *See McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005) ; *Van Orden v. Perry*, 545 U.S. 677 (2005). Yet the Texas Court ruled that the word "cult" always receive Establishment Clause protection, apart from any consideration of context, such that courts of law could not entertain the possibility that accusations of being a "cult" might be defamatory.[7] Amici believe this Court has it right and the Texas

[7] The cases cited by the court below regarding "cult" being a purely religious term actually make precisely the point amici contend in this brief, namely, that context counts when considering

Court has it wrong. Just as the context indicating how, where, and for what purpose the Ten Commandments were displayed on government property provided the trigger for whether or not Establishment Clause protections were warranted in *McCreary* (yes) and *Van Orden* (no), so also here, an examination of context is required to determine if the accusation of being a "cult" is such that the Establishment Clause precludes courts from entertaining a defamation lawsuit, or whether the word has sufficient secular meaning to permit courts to decide defamation suits.

Federal and state courts have recognized that the word "cult" may be defamatory, depending on the context in which it is applied. For example, in *Kennedy v. Children's Service Society of Wisconsin*, 17 F. 3d 980 (7th Cir. 1994), adoptive parents brought suit against an adoption agency after it declined their request to adopt a child because the agency believed that the adoptive parents were members of a cult that engaged in mind control and forced exclusion from society. In affirming the district court that being identified as a member of a cult could be defamatory, the court of appeals held: "In the end...it is clear that *Gaunt's statements that the Kennedys were unsuitable parents because they belonged to a cult could give rise to a claim of defamation.*" *Id.* at 984 (emphasis added).[8] *See also Kliebenstein v. Iowa Conference*

"cult" claims. For example, in *Sands v. Living Word Fellowship*, 34 P. 3d. 955, 959-60 (Alaska 2001), "cult" is used in a purely religious sense because the context involves only "doctrinal differences" between churches and, unlike ECNR, there were no accusations of harmful, criminal practices. Similarly, *Trans v. Fiorenza*, 934 S.W.2d 740, 742 (Tex. App. 1996), is distinguishable because the alleged defamatory statement that a priest was "excommunicated" was purely religious and no criminal accusations were made.

[8] *See also Tuman v. Genesis Associates*, 935 F. Supp. 1375 (1996) (Plaintiffs sued for slander based on being identified as members of a satanic cult); *Pratt v. Nelson*, 127 P.3d 1256 (2005). (The

of United Methodist Church, 663 N.W.2d 404 (Iowa 2003) (accusation that one was the "spirit of Satan" was held to have both religious and secular meanings, with the secular meaning sufficient upon which to base defamation claim).

Even in Texas there is precedent for a result different from the one reached by the Texas Court in the present case. It was held in *Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773 (Tex. App. 1995), [9] that accusations of being a "cultist," or "cult-like" or "occult" as applied to a sales manager who conducted "emotionally charged sales meetings" and encouraged "mind-altering exercises" could indeed be defamatory. The court noted that "In these times, a high degree of opprobrium has attached to terms such as 'cultist,' [and] 'occult'.... False accusations against or characterizations of persons using those and similar terms, we believe, can certainly be considered to be beyond all bounds of decency and to be atrocious and utterly intolerable in a civilized society." *Id.* at 776.

That the offending publication also contains statements that are theological in nature does not insulate Respondents from liability for statements that falsely accuse Petitioners of specific bad acts. Here, amici ask this Court to consider a case from New York that is nearly "on all fours" with the present case, *Landmark Education v. Conde Naste*, 1994 WL 836356 (N.Y. App. Div.1994). There, the plaintiffs alleged defamation due to their inclusion as a "cult" in an article published to the public, and by the combination and juxtaposition of words and statements that attributed certain practices to the identified cults in the article. The court noted that:

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court did not dismiss based on the term "cult" being one of "religious opinion.").

[9] Since the Texas Court did not address or distinguish *Hooper* when deciding the present case, despite Hooper being cited by Petitioners in their brief, Petitioners can only guess that *Hooper* was distinguished because "cult" was there used in a secular business setting, but between competing religious denominations here.

> The interspersed facts and opinions throughout the article ...concerning cults tars all the groups covered by the [article] with the same brush with language that appears to be libelous per se as it addresses the office, profession or trade of plaintiff.... [S]tatements that contain or imply assertions of provably false facts will likely be actionable." *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 245, quoting *Milkovich v. Lorain Journal Co.*, 497 US 1. In applying the previously outlined test it cannot be questioned that cult has a precise meaning which is readily understood as it was defined in the article. The statements made are capable of being proven true or false as "the Forum's" procedures can be matched against the defined qualities of cults. [T]his Court believes it is for a jury to determine whether the words directed generally to the "cults" covered in the [article] would lead the reasonable reader to believe, in the context of the whole [article] that the plaintiffs had indulged in these practices. *New Testament Fellowship v. E.P. Dutton & Co,*[10] *supra; Landmark Education v. Conde Naste, supra.*

Just as in *Landmark Education*, the defined "characteristics of cults" as defined in *ECNR* (including criminal activ-

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[10] Notable also is *NT Missionary Fellowship, v. E.P. Dutton & Co., Inc.*, 112 A.D. 2d 55 (1985), a defamation lawsuit based on a book entitled Let Our Children Go —an account of cults that program young people with brainwashing. There, the court noted that "the book tars all of the groups covered by the book with the same brush, and that no innuendo is necessary to bring out the defamatory character of such words." *Id.* at 57-58 (emphasis added). It is for a jury to determine whether these words, directed generally to the "cults" covered in the book, would lead the reasonable reader to believe, in the context of the whole book, that the plaintiffs had indulged in these practices. *Id.* at 57-58 (emphasis added).

ity) and attributed to Petitioners as a "cult," are statements that are capable of being proven true or false. The case should therefore have been sent to a jury to decide whether such accusations, in context, were defamatory.

IV. In wrongly applying the "ecclesiastical abstention" doctrine to shield Respondents from liability for their otherwise defamatory accusations related to being a "cult," the Texas Court violated the Religion Clauses of the First Amendment by treating Petitioners as if they were members of Respondents' denomination, and also destroyed the doctrine's "implied consent" requirement.

The Texas Court was Oedipus-like in its approach to the Establishment Clause:[11] by over-zealously attempting to avoid an Establishment Clause problem, it created one. The Texas Court was wrong to lean on the "ecclesiastical abstention" doctrine[12] identified in *Milivojevich*, 426 U.S. 696, to support its holding that it was precluded from deciding whether Petitioners were defamed when they were listed as a "cult" in a book ascribing criminal conduct to cults, for that doctrine does not apply to secular disputes between different denominations. *Gen. Council on Finance and Administra-*

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[11] Although the "ecclesiastical abstention" doctrine is usually understood as a means to prevent the government from interfering with the Free Exercise of religion, the Texas Court spoke of it as an Establishment Clause doctrine.

[12] Although the Texas Court never used the term "ecclesiastical abstention," it is apparent that they relied upon the doctrine. Harvest House, 190 S.W.3d at 211-12. First, they cited Milivojevich, which was an "ecclesiastical abstention" case, as the primary basis for their decision; next, it cited Tran, 934 S.W.2d at 742, 744, another "ecclesiastical abstention" case, mentioning that the issue there was "a matter of ecclesiastical concern." Lastly, it stated that the definition of "cult" was an "ecclesiastical matter" and cited *Sands*, 34 P.3d at 960, which relied upon "ecclesiastical abstention" cases for its decision.

tion of the United Methodist Church v. Superior Court of California, County of San Diego, 439 U.S. 1355, 1372 (1978) (Rehnquist, J. – "this Court has never suggested that [ecclesiastical abstention] constraints similarly apply outside the context of such intraorganization disputes"). *Paul v. Watchtower Bible & Tract Soc. of New York, Inc.*, 819 F.2d 875, 878 (9th Cir. 1987) (ecclesiastical abstention not relevant where former member alleged harm that did not challenge church doctrine); *E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1281 (9th Cir. 1982) (*Milivojevich* not applicable because violation of Title VII not related to an intra-church doctrinal dispute) (abrogated on other grounds).

The "ecclesiastical abstention" doctrine has indeed been cited to prohibit courts from deciding intentional tort cases, including defamation, where the allegedly tortious conduct occurred between members of the same religious group during intra-church ecclesiastical proceedings, such as church discipline, as in *Smith v. Calvary Christian Church*, 614 N.W.2d 590 (Mich. 2000), *Hiles v. Episcopal Diocese of Mass.*, 773 N.E.2d 929 (Mass. 2002), *O'Connor v. Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994), *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp.2d 732 (D.N.J. 1999), *Patton v. Jones*, 212 S.W.3d 541 (Tex. App. 2006); for clergy employment decisions, see *Salzgaber v. First Christian Church*, 583 N.E.2d 1361 (Ohio Ct. App. 1989), *Higgins v. Maher*, 210 Cal. App. 3d 1168 (Cal. Ct. App. 1989); for performance of missionary work, see *Turner v. Church of Jesus Christ of Latter Day Saints*, 18 S.W.3d 877 (Tex. App. 2000); for reconciliation of members, *see Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America*, 860 F. Supp. 1194 (W.D. KY 1994); and for religious divorce proceedings, *see Sieger v. Union of Orthodox Rabbis*, 1 A.D.3d 180 (N.Y. App. Div. 2003).

However, to amici's knowledge, the "ecclesiastical abstention" doctrine has never been applied in a situation like the one presently before this Court, where the parties are not

part of the same religious group, and where the defamatory statements are not related to the ecclesiastical workings of a particular group.[13] *See, e.g., Kliebenstein*, 663 N.W.2d 404 (term potentially importing both religious and secular meaning published to non-members and held actionable as defamation); *Callahan v. First Congregational Church of Haverhill*, 808 N.E.2d 301 (Mass. 2004) (defamatory comments made outside intra-church disciplinary process held actionable); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989) (defamatory comments made regarding non-member not protected by First Amendment).

The reason "ecclesiastical abstention" only applies to intra-church disputes is because the doctrine requires the consent of the parties to be governed by the doctrines, rules, and authority figures of a given church. This Court first stated in *Watson v. Jones*, 80 U.S. 679, 728-29 (1871) that:

> The right to organize voluntary religious associations, to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.

(subsequently relied upon in *Milivojevich*, 426 U.S. at 724-25). Since Petitioners are not part of Respondents' religious group, they are not part of the ecclesiastical workings of Respondents' church organization or ministry; nor have they ever consented to a waiver of their civil law rights regarding

[13] Despite the accord in results across jurisdictions – barring defamation claims by the "ecclesiastical abstention" doctrine only during intra-church ecclesiastical proceedings – amici agree with Petitioners that the several state and federal jurisdictions are in disarray as to how to approach such cases.

Respondents. By applying a doctrine that is only applicable for intra-church disputes, the Texas Court has violated both the Establishment Clause and Free Exercise Clause – treating Petitioners as if they were consenting members under Respondents' ecclesiastical umbrella.

Finally, amici are concerned that the application of the "ecclesiastical abstention" doctrine by the Texas Court will wreak serious damage on First Amendment Religion Clause jurisprudence. Since the "ecclesiastical abstention" doctrine was applied to Petitioners despite the fact that there was never any consent on their part, either implicitly or explicitly, to be governed by the ecclesiastical government of Respondents, allowing the decision to stand will gut the doctrine of the consent requirement upon which it stands and allow religious groups going forward to act in ways that harm non-member individuals without the possibility of liability. Such non-consenting non-members will be left with no recourse in an ecclesiastical tribunal because they are not members, and no recourse in a court of law because consent is no longer required for ecclesiastical abstention by the judiciary. Thus will a doctrine created to direct disputes to either a judicial or ecclesiastical decision-making body transform into a doctrine that affords no adjudication and no justice at all.

CONCLUSION

By denying religious groups the same protections from defamation that are provided to other citizens, the Texas Court's decision could be extremely detrimental to the free practice of religion in America and abroad. Specifically, it allows the larger, recognized and established denominations to completely silence the voice of smaller, dissenting religious movements by using mixed accusations of being a "cult" and engaging in general criminal activity to damage their reputations in ways that are likely to be beyond repair. Under such a label, it does not matter how much a group may attempt to express their religious position through speech – no one will listen. By taking the position that it did, the

Texas Court is essentially closing the religious marketplace of ideas and establishing a permanent hegemony among the currently major denominations in society. This, amici fear, is bad for the United States and the countries around the world that look to the United States for guidance. It is also clearly against the free practice of religion envisioned by our founders. Furthermore, the Texas Court's incorrect application of the "ecclesiastical abstention" doctrine not only violated Petitioners' First Amendment rights, but it completely destroyed the "implied consent" requirement at the core of the doctrine such that, if not overturned, religious groups may now avoid liability for harming non-consenting non-members. Granting religious organizations carte blanche to act in ways that harm non-consenting persons will surely result in society's backlash against religion. Therefore, amici ask this Court to grant certiorari to rectify this situation before religious adherents everywhere suffer grave harm to their reputations, society suffers from a significant loss of religious expression, and all religions suffer from public backlash due to non-consenting non-members being harmed without judicial recourse. The petition for a writ of certiorari should be granted, and the Court should summarily reverse the decision below.

Respectfully submitted.

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